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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

ANDREAE *v.* SELFRIDGE & COMPANY, LIMITED.

C. A.
1937
May 25,
26, 27, 28.

[1935. A. 1449.]

Nuisance—Rebuilding operations—Nuisance from noise and dust —Reasonable care—New methods of demolition and rebuilding— Damages—Discrimination between permissible and non-permissible nuisance.

The plaintiff was the occupier of a piece of land which formed part of an island site and on this piece of land she carried on the business of an hotel proprietor. The remainder of the site had been acquired by the defendant company, which was proceeding to demolish the various properties which then occupied the site and to rebuild. The plaintiff complained that the defendant company in carrying out its building operations had conducted them in such a way as by noise and dust to interfere with the reasonable and comfortable enjoyment by her of her premises, and brought the present action for damages. Bennett J., before whom the action was tried, found that the damages alleged had been proved, and assessed them at 4500*l*. On appeal:—

Held, (1.) that no cause of action arises in respect of operations, such as demolition and building, if they are reasonably carried on and all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours.

In determining what is reasonable, methods of building and demolition must not be taken as stabilized, but new inventions and new methods may be reasonable in the altered circumstances and developments of the day.

(2.) That the evidence showed that the plaintiff was inconvenienced by the dust and noise, but in estimating the damages the Court must be careful not to penalize the defendant company by throwing into the scales against it losses caused by operations which the defendant company was legitimately entitled to carry out; the defendant company could be made liable only in respect of matters in which it crossed the permissible line.

(3.) The order of Bennett J. would be varied by reducing the damages to 1000*l.*

APPEAL from a decision of Bennett J.

The defendant in the action, Selfridge & Co., Ld., appealed against a judgment of Bennett J. in the Chancery Division, whereby he awarded to the plaintiff a sum of 4500*l.* as damages for nuisance.

The defendant company had acquired as a building site land and buildings forming part of an island site to the south of Wigmore Street, between that street and Somerset Street, and bounded on the east by Duke Street and on the west by Orchard Street, and was in course of demolishing the buildings on that site and constructing new buildings in their place. The plaintiff had for some time occupied two houses on the north side of the site facing Wigmore Street, Nos. 119 and 121 Wigmore Street, where she carried on the business of an hotel proprietor. On October 21, 1931, she agreed to sell her lease to the defendant company. The purchase was completed on September 29, 1936, and her business as an hotel proprietor in connection with these houses thereupon came to an end.

The defendant company carried out four operations. The first operation consisted of the demolition of the buildings occupying the south-west corner of the site and the erection thereon of a new building. This operation began on November 21, 1931, when the demolition of the buildings occupying that portion of the site was begun, and continued until February 13, 1932. The second operation consisted of the demolition of Nos. 16–20 Somerset Street and Nos. 10, 11 and 12 Orchard Street, and the construction on those sites of certain other buildings. That operation began on July 1, 1935, when the defendant company began to demolish Nos. 10–12 Orchard Street, and the work of demolition of those buildings, and some further demolition, which formed part of the same operation, were completed by September 28, 1935. The writ was issued on July 16, 1935.

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The third operation consisted of the installation of a lift in buildings which had formerly been carried on as an hotel, known as the Somerset Hotel, occupying Nos. 5–8 Orchard Street. That began on April 25, 1936, and it continued for a comparatively short time. There was a fourth operation, the demolition of No. 125 Wigmore Street, with regard to which no complaint was made.

The first operation consisted of pulling down the existing houses and excavating to the depth of some 60 feet into the ground. The constructional part of the work consisted of erecting upon the site a steel-framed building, with three basements, the framework of these subterranean parts of the building again consisting of a steel framework. The plaintiff first complained, in regard to what was being done in connection with that operation, on March 14, 1932. There were several cranes upon the premises and for some weeks before the complaint was made the defendant company was using cranes at night in connection with its work. When complaint was made, the defendant company agreed, in a letter dated March 16, that the cranes should be stopped between the hours of 10 P.M. and 7 A.M.

The second operation consisted of demolition work, which caused a very large quantity of dust and grit to be thrown into the air and carried into the plaintiff's premises.

For the purpose of the second operation the defendant company's contractors used two pneumatic hammers. As the result of objection by a professional man, who had business premises close by, the defendant company limited the use of those pneumatic hammers to certain hours in the day. The actual use of these hammers extended over six days only. They were not used by night.

The appeal was heard on May 25, 26, 27, 28, 1937.

Fergus Morton K.C. and *Roger Turnbull* for the appellant company. Bennett J. based his judgment almost entirely on the first operation. The nuisance here was temporary and the demolition was carried out with reasonable care and skill. On this point we rely on *Harrison* v. *Southwark & Vauxhall Water Co.* (1)

In recent cases of building operations it has been considered that no noise should happen between 10 P.M. and 6.30 A.M., and the Court does not interfere in regard to noise by day unless there is some special ground.

Demolition operations, if conducted in a reasonable way, do not constitute an actionable nuisance. The methods which may be considered reasonable are not stereotyped. New inventions and new developments require new methods. Further, the plaintiff was making a loss in her hotel before the operations started. Bennett J. has failed to take this into account and has also taken an excessive view of what constitutes nuisance. Even if some actionable nuisance was caused, the defendants are not liable for the whole of the damage, but only for the excess beyond what they were legally entitled to do.

As this is a case where no injunction is claimed, an actual nuisance, that is, a nuisance from which damage flows, has to be proved. In this connection certain considerations must be borne in mind: (1.) all noise not amounting to a nuisance must be disregarded; noise and dust amounting to a nuisance but resulting from temporary and lawful work carried out with reasonable care and skill does not constitute an actionable nuisance: see *Harrison* v. *Southwark & Vauxhall Water Co.* (1); (2.) all evidence of nuisance and damage after the date of the writ must be disregarded as creating a cause of action, although, if actionable nuisance was caused by the earlier operations, the later operation can be taken into account in estimating the damages.

It is submitted that the judge ought either to have dismissed the action or to have awarded a small sum for damages.

H. B. Vaisey K.C. and *Laurence Tillard* for the respondent. Having regard to the nature of the operations and the length of time occupied in their performance the case is distinguishable from *Harrison* v. *Southwark & Vauxhall Water Co.* (1)

(1) [1891] 2 Ch. 409.

The amount of the damages is entirely for the discretion of the Court and it is submitted that on the evidence they are not excessive.

Fergus Morton K.C. replied.

SIR WILFRID GREENE M.R. stated the facts as above set out and continued: I will now see what was the ground of the learned judge's judgment. That is to be found in one or two sentences. He says this: "I cannot regard "what the defendants did on the site of the first operation "as having been commonly done in the ordinary use and "occupation of land or houses. It is neither usual nor "common, in this country, for people to excavate a site "to a depth of 60 feet and then to erect upon that site a "steel framework and fasten the steel frames together "with rivets." That is a finding in regard to the first operation. Now comes what he finds with regard to the second operation: "Nor is it, I think, a common or ordinary "use of land, in this country, to act as the defendants did "when they were dealing with the site of their second "operation—namely, to demolish all the houses that they had "to demolish, five or six of them I think, if not more, and to "use for the purpose of demolishing them pneumatic "hammers."

The judge's views on those matters come into the reasoning of his judgment in this way. He found that, by reason of all three operations, there was a substantial interference with the comfort of the plaintiff in the reasonable occupation and use of her houses, such that, assuming damage to be established, an actionable nuisance would be constituted. But it was said that when one is dealing with temporary operations, such as demolition and re-building, everybody has to put up with a certain amount of discomfort, because operations of that kind cannot be carried on at all without a certain amount of noise and a certain amount of dust. Therefore, the rule with regard to interference must be read subject to this qualification, and there can be no dispute about it, that in respect of operations of this character, such as demolition and building, if they are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, whether from noise, dust, or other reasons, the neighbours must put up with it. The learned judge has in effect said that that qualification does not apply in the present case, because that qualification can apply only where the operations are operations that may be described as the usual and normal use of land by people in this country. He has found that these operations which he has described in the passages I have read are not usual operations, and, therefore, the whole of the operations in question, not merely matters in respect of which some precautions were carelessly or negligently omitted, but the entirety of the operations, were operations which, if they produced discomfort or interference would be actionable, and the entirety of the damage suffered would be recoverable. With great respect to the learned judge, I take the view that he has not approached this matter from the correct angle. It seems to me that it is not possible to say, nor do I think that there is any evidence in this case which would warrant its being said, that the type of demolition, excavation and construction in which the defendant company was engaged in the course of these operations was of such an abnormal and unusual nature as to prevent the qualification to which I have referred coming into operation. It seems to me that, when the rule speaks of the common or ordinary use of land, it does not mean that the methods of using land and building on it are in some way to be stabilized for ever. As time goes on new inventions and new methods enable land to be more profitably used, either by digging down into the earth or by mounting up into the skies. Whether, from other points of view, that is a matter which is desirable for humanity is neither here nor there; but it is part of the normal use of land, to make use, upon your land, in the matter of construction, of what particular type and what particular depth of foundations and particular height of building may be reasonable, in the circumstances, and in view of the developments of the day. I am unable to take the view that any of these operations was of such an abnormal character as to justify treating the disturbance created by it, and the whole of the disturbance created by it, as constituting a nuisance. That applies both to the first and to the second operations. The learned judge moreover says, with regard to the second operation, as I read it, that it is the demolition of all the houses which he finds to be unusual, and the demolition of them by means of pneumatic hammers. In point of fact, as I have said, it was only for a short period and over a very limited space that the pneumatic hammers were used. It seems to me, therefore, that the learned judge's view is open to objection on the grounds which I have stated. The learned judge, when coming to deal with the matter of damage, has apparently attributed to the defendant company's operations, if not the whole of the loss of custom which the plaintiff has suffered, at any rate a very substantial part of it. That was a much easier thing for him to do once he had come to the conclusion that the entirety of the defendant company's operations was unjustified, because it is a matter, I should have thought, of common knowledge, and, indeed, common sense, that building operations on this scale going on at the back of an hotel cannot be a good thing for its custom. That, however, does not in the least mean that the plaintiff, as owner of the hotel, has for that reason some right of complaint which another person would not have. Guests at hotels are very easily upset. People coming to this hotel, who were accustomed to a quiet outlook at the back, coming back and finding demolition and building going on, may very well have taken the view that the particular merit of this hotel no longer existed. That would be a misfortune for the plaintiff; but assuming that there was nothing wrong in the defendant company's works, assuming the defendant company was carrying on the demolition and its building, productive of noise though it might be, with all reasonable skill, and taking all reasonable precautions not to cause annoyance to its neighbours, then the plaintiff might lose all her clients in the hotel because they had lost the amenities of an open and quiet place behind, but she would have no cause of complaint. The judge, having found that the entirety of the operations was objectionable, had less difficulty in dealing with the question of damages, because he did not have to discount any loss of clientele by striking out of the computation any loss which might have been due to matters which were not in themselves objectionable—namely, the clearing of the site, the general bustle and activity, and the noise inseparable from building operations throughout the day. He had not to make that dissection, nor did he attempt to do it. The result is that he has attributed the entirety or, at any rate, the greater part of the loss to the defendant company's operations.

That brings me to the question of damage.

The real problem, to my mind, is this. I will take the first operation first. There was unquestionably an interference with the plaintiff's rights by noise, noise which took place at unreasonable hours, noise which, according to the evidence, affected the guests in the hotel, caused them to complain, and generally interfered with their comfort. That is the first matter. The second matter is this, that the profits of the hotel did not recover in the way in which, having regard to the history of the hotel, one might reasonably have expected them to recover ; but it is not legitimate, to my mind, and it is indeed impossible, to draw the inference that the failure of the profits to recover was due, to the extent to which the judge thought it was due, to the defendant company's operations, and it is still more illegitimate to say that it was due to that part of the defendant company's operations which constituted a nuisance. Therefore, the Court is necessarily compelled to take some broad common-sense view of the situation, having regard to the evidence. One has to remember various things. People who go to hotels do not like having their nights disturbed. One has to remember that hotel custom is obtained, and, indeed, very largely kept, by recommendation. Those are matters of common knowledge. One also must not assume that, when a guest goes away from an hotel, he is satisfied only because he has not made a complaint at the office. Various matters of that kind must be remembered. On the other hand, there are in this case other circumstances, such as the lack of action taken. If there was a real outflow of guests, one would have expected action to be taken at the time. I take the view, that there was an injury done to the business at that time, an injury which did have a deleterious effect on its recovery; but having regard to the fact that I approach the matter on a different principle from that on which the learned judge approached it, the actual injury in that respect is, in my view, very much smaller than he found.

The next matter is the question of the second operation. The first thing to be dealt with there is whether or not anything which the defendant company did in connection with the second operation was a breach of its obligations towards its neighbours. The crucial matter is the matter of dust. I have already indicated that, to my mind, the plaintiff's evidence establishes that the quantity of dust and grit let loose by this operation was quite insufferable. The substantial point that is made with regard to it by Mr. Fergus Morton is: Assuming that it was insufferable—this, of course, he does not admit, but I hold against him there—the plaintiff must put up with it, provided that all reasonable and proper precautions were taken to save annoyance to the neighbours. Now, that is a matter of evidence. I have listened attentively to the evidence that was read on the side of the defendant company with regard to it, and I am not satisfied that it has discharged the burden of proof upon it.

I desire here to make one or two general observations on this class of case. Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill. It is not a correct attitude to take to say: "We will "go on and do what we like until somebody complains." That is not their duty to their neighbours. Their duty is to take proper precautions, and to see that the nuisance is reduced to a minimum. It is no answer for them to say: "But this would mean that we should have to do "the work more slowly than we would like to do it, or it

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"would involve putting us to some extra expense." All those questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so slowly or so expensively, for the purpose of preventing a transient inconvenience, that the cost and trouble would be prohibitive. It is all a question of fact and degree, and must necessarily be so. In this case the defendant company's attitude seems to have been to go on until somebody complained, and, further, that its desire to hurry its work and conduct it according to its own ideas and its own convenience was to prevail if there was a real conflict between it and the comfort of its neighbours. That, to my mind, is not carrying out the obligation of using reasonable care and skill. Linking that up with what I have said about dust in the second operation, it seems to me that the defendant company has not carried out that obligation. The use of reasonable care and skill in connection with matters of this kind may take various forms. It may take the form of restricting the hours during which work is to be done ; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area ; it may take the form of using proper scientific means of avoiding inconvenience. Whatever form it takes, it has to be done, and those who do not do it must not be surprised if they have to pay the penalty for disregarding their neighbours' rights. The nuisance from dust is, to my mind, established, and it is further established quite clearly by the evidence that, in the case of the second operation, the plaintiff's clients were seriously inconvenienced, that clients left, and that other clients declined to come. That seems to me to be the general effect of what took place. When the clients came to the hotel and were shown the rooms in July, and found all the windows shut because of the dust, it does not require very much imagination to suppose that a thing of that kind would deter any one from going to the hotel. I think that, on the evidence, there is proof of a substantial loss of actual customers, with, in the background, the inevitable repercussion that has on the reputation of an hotel. On the other hand, in this case, as in the other case, one must be careful not to penalize the defendant company by throwing into the scales against it the loss of clients caused by operations which it was legitimately entitled to carry out. It can be made liable only in respect of matters on which it has crossed the permissible line.

The third operation is a minor matter and I need say no more about it. The effect comes to this, putting it all together, that, in respect of the first operation, the plaintiff suffered an actionable nuisance; she suffered damage both by personal inconvenience (which is not such an important matter) and by the unfortunate result upon her guests and the reputation of her hotel. That damage, or similar damage, she also suffered in respect of the second operation. I think that she is entitled, not to a nominal sum, but to a substantial sum, based upon those principles. What that sum is to be is a matter as to which the individual mind can only satisfy itself as to what is fair; but in arriving at the sum which I consider to be the proper one, and which the other members of the Court consider to be a proper one, I have discounted any loss of custom, or endeavoured to discount, so far as I can, any loss of custom, which might be due to the general loss of amenities owing to what was going on at the back, and I have tried to give what, in my opinion, would be a fair measure of the loss which, on the evidence, I infer that the plaintiff has suffered from that part of the defendant company's operations of which she has legitimate cause for complaint over the period in question.

I would say that, in a case of this kind, where the defendant company has, at certain stages and in certain respects, shown, in my judgment, a reprehensible lack of regard for the duty which it owes to its neighbours, I should not be disposed, in drawing inferences, to draw inferences with regard to loss of custom in the defendant company's favour. It is a very difficult thing to attribute loss of custom to a particular cause in a case of this kind. Guests are scattered; it is quite impossible to collect all the guests who left and find out why they left. This is eminently a case where a jury, or a judge sitting alone, should use common sense and their knowledge of affairs in relation to the evidence which is given. I think the evidence in this case does establish a substantial injury, and the sum at which I think, on that basis, the damages should be fixed is 1000*l.*

The judgment of the judge must, therefore, be varied to that extent, and the damages reduced to 1000*l.*

ROMER L.J. I agree, and have nothing to add.

SCOTT L.J. I also agree, and have nothing to add.

Order varied.

Solicitors for the appellant company; *Jaques & Co.*
Solicitors for the respondent: *Boyce, Evans & Sheppard.*

W. I. C.

In re CHETWYND'S ESTATE.

C. A.
1937
July 2.

DUNN'S TRUST, LIMITED *v.* BROWN.

[1935. C. 3505.]

Contract—Moneylending transaction—Joint and several promissory note —Implied request by principal debtor—Loan by moneylenders— Non-compliance with s. 6 *of Moneylenders Act*, 1927 (17 & 18 *Geo.* 5, *c.* 21)—*Default by principal debtor—Payment off of loan by guarantor—Death of principal debtor—Right of guarantor to recover against principal debtor's estate.*

On October 24, 1930, S. signed a joint and several promissory note. The other signatory to the note was the testator, C. The terms of the note were to pay to a moneylending company or order "the sum of 156*l.* for value received "by five equal consecutive monthly instalments of 6*l.*, the "first of such monthly payments to commence and become due "and payable on November 24, 1930, and the balance of 126*l.* to "become due and payable on April 24, 1931." There was a default clause under which the whole of the principal became payable on default of payment of the first or any of the succeeding 6*l.* instalments. C., who was the principal debtor, paid the first instalment but omitted to pay any of the subsequent instalments. The consequence was that S., after making some investigations, paid on January 27, 1931, the sum of 138*l.* in full discharge of the note, which was then handed back to him. The promissory note did not comply with the requirements of s. 6 of the Moneylenders Act, 1927, and therefore could not have been enforced by the moneylenders against either C. or S. Neither of them, however, was aware of that defect or had any doubt about his liability under the note. C. died in 1935, but no part of the debt was paid by him during his lifetime to S.

Bennett J. held that S. was entitled to rank as a creditor against the estate of C. for the sum of 138*l.*

On appeal by the plaintiffs in the administration action:—

Held, that S. was entitled to prove as a creditor against the estate of C. for the money paid by him to the moneylenders, notwithstanding that the promissory note did not comply with the requirements of s. 6 of the Moneylenders Act, 1927, since the only request which could be implied by law as a term of the transaction was merely one by C. to S. to pay, if C. did not, and not "to pay this sum or so much of it (if any) as is not made "irrecoverable by the Moneylenders Act."

Alexander v. *Vane* (1836) 1 M. & W. 511 applied.

Sleigh v. *Sleigh* (1850) 5 Ex. 514 distinguished.

Decision of Bennett J. affirmed.

APPEAL from a decision of Bennett J. on a summons taken out by Wilfrid Reginald Stephenson to vary the Master's order made in an administration action. The action was brought by the plaintiffs, creditors of the estate of the late Sir George Guy Chetwynd, on behalf of themselves and all other creditors against the executors of Sir George Guy Chetwynd.

By the summons Stephenson asked that he might be allowed to rank as a creditor against the estate for 138*l.* The Master in the course of his inquiries as to debts had refused the application.

The facts relating to the claim were shortly as follows: On October 24, 1930, the testator borrowed from B. S. Rhodes, Ld., a firm of moneylenders, a sum of 156*l.*, and at his request Stephenson joined with him in giving a joint and several promissory note for the repayment of that sum. The note was in the following terms: "We jointly and severally "promise to pay Messrs. B. S. Rhodes, Ld., or order, at 13 "and 14 New Bond Street, Piccadilly, London, W.1, the sum "of 156*l.* for value received by five equal consecutive monthly "instalments of 6*l.*, the first of such payments to commence "and become due and payable on November 24, 1930, and the "balance of 126*l.* to become due and payable on April 24, 1931. "In the event of default being made in the payment of the "first or any succeeding instalment or any part thereof so "much of the balance of the said sum of 156*l.* as represents "principal shall forthwith become due and payable with "interest on any overdue payment at the rate of 60 per cent, "until payment."

The note did not comply with the provisions of s. 6 of the Moneylenders Act, 1926, and the moneylenders could not therefore have sued either the testator or Stephenson in respect of it. Neither of them, however, was aware of that defect or had any doubt about his liability on the note.

The testator paid the first instalment due on November 24, 1930, but failed to pay the subsequent instalment which became due on December 24, 1930. In January, 1931, these facts were communicated by the moneylenders to Stephenson, who after making inquiries as to the financial position of the testator paid off the 138*l.*, the balance due on the note to the moneylenders who then handed over the note to him.

The testator died in August, 1935.

No payments in respect of the note were ever made to Stephenson by the testator during his lifetime.

Bennett J. held that Stephenson was entitled to the order asked for—namely, that he was to be allowed to rank as a creditor in the estate of the testator for the sum of 138*l.*

The plaintiffs in the administration action appealed.

The appeal was heard on July 2, 1937.

H. J. Wallington K.C. and *Cyril Salmon* for the appellants.

M. J. L. Beebee for the respondent Stephenson and *F. S. Laskey* for the executors of the testator's will were not called upon to argue.

The arguments on behalf of the appellants fully appear from the judgment of the Master of the Rolls.

SIR WILFRID GREENE M.R. On October 24, 1930, the present respondent, Mr. Wilfrid Stephenson, signed a joint and several promissory note. The other signatory to the note was the testator, Sir Guy Chetwynd. The note was a joint and several promissory note, the terms being to pay to a company called B. S. Rhodes, Ld., or order, the sum of 156*l.* The method of payment was to be five equal consecutive monthly instalments of 6*l.*, the first to be paid by November 24, 1930, and the balance of 126*l.* to become due and payable on April 24, 1931. There was a default clause by which the whole of the principal became payable on default of payment of the first or any of the succeeding 6*l.* instalments. Sir Guy Chetwynd paid the first instalment but omitted to pay any of the subsequent instalments. The consequence was that Mr. Wilfrid Stephenson, after making some investigations, paid on January 27, 1931, the sum of 138*l.* in full discharge of that note, which was then handed back to him. He thereby relieved Sir Guy Chetwynd of what prima facie appears to be the liability which the note imposed upon him.

If the matter had remained there, and there had been no further facts in the case, there could in my opinion have been no question of Mr. Stephenson's right to recover against the estate of Sir Guy Chetwynd the amount which he had paid, because the case would have been a simple one of a guarantor entering into an obligation of guarantee at the request of the principal debtor and making the payments on default of the debtor, and making them in circumstances where the liability implied a request. If the position be analysed—taking the facts as far as I have stated them—when Mr. Stephenson at the request of Sir Guy Chetwynd went to Messrs. Rhodes' office and signed these documents, Sir Guy Chetwynd impliedly requested him to pay Rhodes if he—Sir Guy—made default, and impliedly undertook to pay to Mr. Stephenson anything which he might so pay.

That would be a perfectly simple and ordinary case, the legal foundation of which is beyond dispute. There was, however, an additional fact which is said to alter the result—namely, that Messrs. Rhodes are moneylenders, and by s. 6 of the Moneylenders Act, 1927, no contract for repayment of a moneylender's loan is to be enforceable unless certain requirements laid down in the section are complied with. The section does not have the result that there is no contract; it merely makes the contract unenforceable. It is not disputed that in this case the conditions laid down by the section were not complied with, and the result is that had Messrs. Rhodes sued either Sir Guy Chetwynd or Mr. Stephenson on the note, s. 6 would have afforded a good defence.

It is contended that in view of that circumstance the whole position is changed and that it is not possible for the law to imply as a term of the transaction any request by Sir Guy Chetwynd to Mr. Stephenson to pay that sum. The request which is to be implied, it is said, is not merely, "Please pay "if I do not," but "Please pay whatever sum, if any, I am "liable to pay under this contract."

That appears to me to be something entirely unreal. In the present case there can be no question on the evidence that either of these gentlemen had in mind for one moment any doubt as to his liability, or as to the enforceability of this contract of loan. When they went to the office of Messrs. Rhodes the intention to be imputed to both of them, and to my mind the only intention, was that Sir Guy Chetwynd intended to pay, that Mr. Stephenson intended to pay if called upon, and that Sir Guy Chetwynd intended to reimburse Mr. Stephenson if Mr. Stephenson paid. It never entered into the head of either of them, so far as anything appears from the evidence, that s. 6 had any effect on the validity of the contract. Nor am I prepared to assume for one moment that if they had learned of its existence and had known that it affected the contract, their actions would have been in any way different. Nor do I think that in such a case the implication which the law raises would have been at all different. It seems to me that the simple implication which arises here is a request by Sir Guy Chetwynd to pay if he—Sir Guy Chetwynd—does not pay. I cannot find any justification, either in the circumstances of the contract or in any authority that has been cited to us, for adding to this case the qualification which counsel has suggested should be added to the ordinary implication which arises in cases of guarantee.

There are two authorities to which I should refer. The first is *Alexander* v. *Vane* (1), where a person became guarantor of a liability incurred by a purchaser in respect of some harness. The liability which the guarantor was incurring was a liability which could not be enforced as against him because no note or memorandum was signed in relation to it as required by the Statute of Frauds. In spite of the fact that the guarantor was under no liability he made the payment which he had undertaken to pay. It was said that, as he was under no liability, he ought not to recover.

Lord Abinger C.B. in that case said this (2): "Now, "although he was under no obligation to pay it, and had entered "into no contract which bound him to do so, he had never-"theless made an engagement which bound him in point of

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(1) 1 M. & W. 511.

(2) Ibid. 513.

"honour, and that was entered into in the presence of the "defendant. The payment must therefore be taken to have "been made by his authority. The promise was, that, if the "defendant did not pay, the plaintiff would ; there was there-"fore an agreement, that, if the money was paid for the "defendant, it might be recovered from him." Parke B. said (1) : " The plaintiff is bound to prove that he paid this "money with the authority of the defendant. If the engage-"ment had been made in the absence of the defendant, it "would have given no authority to the plaintiff to pay the "money, and the payment would have been made without "any authority, express or implied. But, it being made in the "presence of the defendant, there was an implied contract, "that, if the plaintiff paid the money, the defendant would "repay it. It is precisely the same as if the defendant had "requested the plaintiff to pay the money."

It was impossible in that case—at any rate, the Court decided that it would not be legitimate—to read into the simple request a request only to pay if the guarantor was liable under the guarantee. Had such a qualification been read in, the case would have been decided the other way. The case was treated, however, as being a perfectly ordinary one of a request to pay without any reference to the question of the legal liability of the guarantor.

But the case on which Mr. Wallington relied very strongly is *Sleigh* v. *Sleigh* (2) decided in 1850, some years after *Alexander* v. *Vane* (3), and Parke B. was a party to that decision also. The plaintiff was the drawer of an accommodation bill accepted by the accommodated party and not paid on maturity. The holder of the bill did not present it, nor was any notice of dishonour given. In those circumstances the drawer of the bill, the accommodation party, paid off part of the amount due under the bill. If he had paid off the entire bill and had become the holder of it, then of course, as was pointed out in the judgment, his position would have been different. But he paid part, and he then proceeded to bring an action to recover the amount paid as money paid for the use of the defendant, who was the accommodated party, the acceptor. It was held that he was not entitled to recover.

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(1) 1 M. & W. 514.

(2) 5 Ex. 514.

(3) 1 M. & W. 511.

Parke B. said (1): "There is no doubt, that, if a person "lends his money to another for his accommodation, the party "accommodated undertakes to pay the bill at maturity, and, "further, to indemnify the person accommodating him, in case "that person is compelled to pay the bill for him." He then referred to Byles on Bills, p. 94, and proceeded: "And this, "no doubt, is an implied authority to such person to pay it, "if he be in that situation that he may be compelled by law "to pay the bill, though the holder do not actually compel "him to do so; and after payment he may sue the party "accommodated for money paid on his account; for such "payment is, in truth, under the implied authority given by "the contract of accommodation between the parties; and "whether this be a payment of the whole bill, or of only a "part of it, makes no difference." A little lower down he said: "Where a payment is made, as in this case, with "the knowledge on the part of the plaintiff that he was "not bound to pay, for the want of a notice of dishonour, "to which he was unquestionably entitled, we think the "payment is not made with the implied authority of the "defendant."

Mr. Wallington said with regard to that case that there the payer—the guarantor, the accommodation party—was under no liability to discharge the amount of the bill. Similarly here he says that there was no liability to discharge the amount of the bill, and just as in that case the authority implied was not one which covered the facts of that case, so here he says the authority to be implied must be an authority which only extends to the limit of the legal liability, whatever it might be.

It appears to me that in that case the real distinction is this. That was a case where the well known machinery with regard to bills of exchange was at the very heart of the transaction, because everybody knew that notice of dishonour was required and everybody knew that due presentation was required. In a case of that kind, which is dealing with a very special type of contract, such as that which arises under a bill of exchange, it appears to me quite reasonable that the Court should treat the case as one where the only implied authority to pay was to pay in accordance with the rules affecting that particular subject-matter, and where it could not imply from the facts any authority or request by the accommodated party to pay otherwise than in accordance with the ordinary routine applicable to bills of exchange. In the present case no question of that sort arises. The implication is, in my opinion, a request to pay this sum and no more; not, "This sum or such part of it (if any) as is "not made irrecoverable by the Moneylenders Act," but simply "This sum." I entirely agree with the decision of the learned judge, and in my judgment this appeal should be dismissed.

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(1) 5 Ex. 514, 517.

There is, however, one more point which Mr. Wallington made and which I should mention, to show that I have not forgotten it. He said that when the circumstances of payment in this case are looked at, the payment ought to be taken to have been made by Mr. Stephenson, not in response to any implied request but in order to discharge his own liability as a principal debtor under the note. It seems to me that this is a refinement for which there is no justification on the facts of the present case at all. It is perfectly true that Mr. Stephenson was primarily liable, but he became primarily liable at the request of Sir Guy Chetwynd. When he discharged that primary liability he was doing it under exactly the same implied request as if he had been treated not as a principal debtor but merely as a bare guarantor and nothing else. It seems to me that there is nothing in that point, and therefore, as I said, the appeal must be dismissed, with costs.

ROMER L.J. I agree. If the contract with the moneylender had been one which was enforceable by him, then it is plain from the decision in *Alexander* v. *Vane* (1) that the Court would imply a contract between Sir Guy Chetwynd and Mr. Stephenson, entered into at the same time and as part of the transaction embodied in the joint and several promissory note, that if Mr. Stephenson paid any part of the moneys under the promissory note, Sir Guy Chetwynd would indemnify him against such payment. The law would imply such a contract because in the circumstances the parties must necessarily have intended so to contract. We know, in fact, that the contract with the moneylender was not enforceable by him by reason of the provisions of s. 6 of the Moneylenders Act, 1927, s. 6. Both parties—Sir Guy Chetwynd and Mr. Stephenson—were, however, at all material times in ignorance of that fact. If they were ignorant of that fact they thought that the moneylender could enforce his contract, and, being of that opinion, their intention at the time of the signing of the joint and several promissory note must have been precisely the same as it would have been if the contract had in fact been enforceable. It seems to me that Bennett J. arrived at the right conclusion and that this appeal must be dismissed.

MacKinnon L.J. I agree. The only interest in this case is the apparent divergence—apparent at first sight—between the judgment of Parke B. in 1836 in *Alexander* v. *Vane* (1) and his judgment fourteen years later in *Sleigh* v. *Sleigh.* (2) The explanation of the divergence is that the request to be implied from the facts in the latter case was, " Pay the bill if you receive notice of its dishonour " ; but the request to be implied from the facts in *Alexander* v. *Vane* (1) was, " Pay for the harness if I do not." The request to be implied in *Alexander* v. *Vane* (1) was not, " Pay for "the harness if I do not and if you are legally compellable to "pay." In the present case I think the proper request to imply from the facts of the transaction is, on the part of Sir Guy Chetwynd, " Pay this bill if I do not." But the facts do not warrant the implication that the request

(1) 1 M. & W. 511. (2) 5 Ex. 514.

was "Pay this bill if I do not and if you are legally compellable to pay it." That being so, the present case is exactly the same as *Alexander* v. *Vane* (1), and the decision of the learned judge was right.

Appeal dismissed.

Solicitors: *Woolfe & Woolfe; Vizard, Oldham, Crowder & Cash; Patersons, Snow & Co.*

(1) 1 M. & W. 511.

W. I. C.

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[1934. S. 3831.]

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Local Government—Open space—Conveyance of land to Local Authority for use as open space—Erection thereon of residence for caretaker —Action by Attorney-General to restrain building—Open Spaces Act, 1906 (6 *Edw.* 7, *c.* 25), *s.* 10.

By s. 10 of the Open Spaces Act, 1906: "A local authority "who have acquired any estate or interest in or control over any "open space . . . . under this Act shall, subject to any conditions "under which the estate, interest or control was so acquired—

"(*a*) hold and administer the open space . . . . in trust to allow, "and with a view to, the enjoyment thereof by the public as an "open space within the meaning of this Act and under proper "control and regulation and for no other purpose; and

"(*b*) maintain and keep the open space . . . . in a good and "decent state,

"and may inclose it or keep it inclosed with proper railings and "gates, and may drain, level, lay out, turf, plant, ornament, light, "provide with seats, and otherwise improve it, and do all such "other works and things and employ such officers and servants as "may be requisite for the purposes aforesaid or any of them."

By a conveyance dated April 28, 1905, the Commissioners of Poole Harbour conveyed to the Poole Corporation in consideration of certain covenants a part of certain land known as Sandbanks. The land was expressed to be conveyed to the Council to hold "in fee simple to the intent that the same may for ever here-"after be preserved and used as a pleasure or recreation ground "for the public use." Among the covenants by the Council it was covenanted "That the Council will at all times hereafter "subject as aforesaid preserve the land hereby conveyed as an "open space or as a pleasure ground or recreation ground for the "use of the public and will take all necessary steps to maintain "the land as such." There was also a covenant to reserve a portion of the land for a bathing station.

In 1934, the Council having laid out the land as a recreation or sports ground, with a bathing establishment and so forth, proposed to build a residence for a caretaker on the land.

In an action brought by the Attorney-General at the relation of persons owning or interested in adjoining land to restrain the erection of the caretaker's residence on the open space:—

Held, that the conveyance of April 28, 1905, was a document inter partes in respect of which the covenantees would be the proper parties to sue and not the Attorney-General at the instance of parties interested. It was plain therefore that, if the plaintiff was to succeed in the action, it could only be because he could show that what the Council were doing was in breach of the statutory obligations imposed on them by s. 10 of the Open Spaces Act, 1906.

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Held, further, that the evidence showed that the erection of a caretaker's residence was reasonably necessary to enable the Council to comply with the requirement of s. 10 (*b*) to "maintain and keep "the open space . . . . in a good and decent state" and the Council had therefore power within the last words of the section to erect a caretaker's residence.

Decision of Farwell J. affirmed on grounds some of which were not raised or considered in the Court below.

APPEAL from a decision of Farwell J.

This was an appeal by the plaintiff in the action, the Attorney-General, suing at the relation of a number of individuals interested, against a judgment of Farwell J., who dismissed the action with costs. The object of the action was to obtain an injunction restraining the defendants from erecting on a piece of land known as Sandbanks, near the entrance to Poole Harbour, a certain building which they were proposing to erect as a residence for a permanent caretaker of that piece of land.

The piece of land in question was acquired by the trustees of Poole Harbour, acting under certain statutory powers which enabled them, for the purposes of the works authorized by an Order which was confirmed in the usual way by an Act of Parliament, to acquire it, and the Order contained the usual power of sale of any portion not required for the purposes of the authorized works. The Commissioners of the Harbour of Poole succeeded to the rights of the trustees, and they, by a deed dated April 28, 1905, conveyed to the Corporation of the Borough of Poole, the defendants in this action, a part of Sandbanks containing 12 acres, 2 roods, and 17 perches. That conveyance was expressed to be made in consideration of certain covenants on the part of the Council. It was not a conveyance on sale. No money passed, and the only consideration moving from the Council consisted of the covenants in question. The land was expressed to be conveyed to the Council to hold "in fee simple to the intent that the same "may for ever hereafter be preserved and used as an open space "or as a pleasure or recreation ground for the public use." Then it was provided that: "If any part of the said land shall "not be required for the purpose aforesaid the same may by the "direction or with the sanction of the Local Government Board "be used for any other purpose for which the Council are or shall "hereafter be authorized by statute to acquire land except that "no part of the said land shall be used for any purpose or in "any manner which may be a nuisance or annoyance to the "Commissioners or their assigns as owner or owners of any "property adjoining or near thereto without their or his consent "in writing." There was then a covenant by the Council with the Commissioners with regard to dedicating a road, and also this covenant: " That the Council will at all times hereafter "subject as aforesaid preserve the land hereby conveyed as an "open space or as a pleasure ground or recreation ground for the "use of the public and will take all necessary steps to maintain "the land as such." There was also a covenant to reserve a portion of the land for a bathing station and to erect a sanitary convenience, and beyond that there was nothing in the document of any importance.

At the hearing before Farwell J. on November 24, 25 and 26, 1936, the argument on behalf of the plaintiffs was based principally on the construction of the Poole Corporation Act, 1919, and partly on the Public Health Act, 1875, and not on the Open Spaces Acts. The covenants in the deed of April 28, 1905, were also referred to.

Farwell J. held that what the Corporation had done was not a breach of the covenants in the deed of April 28, 1905, though, if it had been, the Corporation, in the same way as any individual covenantor, might have been prevented from erecting the building in question. He also held that what was done was within the powers of s. 164 of the Public Health Act, 1875; since this section must mean that the Corporation is entitled to do anything which is properly and reasonably necessary for the laying out and maintaining of the grounds as pleasure grounds and that the same result followed upon the true construction of the Poole Corporation Act, 1919.

The question on the appeal turned mainly on the construction of s. 10 of the Open Spaces Act, 1906. That section and the other material provisions of the Open Spaces Acts are fully set out in the judgment of the Master of the Rolls.

The appeal was heard on July 8 and 9, 1937.

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Roland Burrows K.C. and *B. B. Stenham* for the appellant. The Poole Corporation are bound by the covenants contained in the conveyance dated April 28, 1905, to preserve the land conveyed to them " as an open space or as a pleasure ground or "recreation ground for the use of the public." Nothing was done to the land till after the passing of the Poole Corporation Act, 1919 (9 and 10 Geo. 5, c. 44), which by ss. 36, 39 and 40 conferred powers that were exercised by making parts of the open space into terraces, a café and a bathing ground. No step was taken to try and stop this development, but now it is proposed to erect on the recreation ground a lodge for a resident caretaker. Sect. 41 of the Act which was inserted for the protection of local residents limited the amount of land on which the powers conferred by the earlier sections could be exercised and further provided that no erection was to be made exceeding 14 feet in height. It was intended to erect the proposed lodge within the permitted area but the erection of the lodge is inconsistent with the preservation of the recreation ground as an open space. The respondents rely, however, on s. 88 of the Act, which provides that all powers, rights and liberties conferred by the Act are in addition to and not in derogation of other statutory powers, and claim that they are entitled to erect the lodge under the Public Health Act, 1875. It is to be noted that there are sites within easy reach of the park on which the caretaker could be housed and the only object of erecting a lodge on the ground is to save expense.

The relevant statute here is the Open Spaces Act, 1906, and not the Public Health, 1875. The Metropolitan Open Spaces Act, 1881 (44 and 45 Vict. c. 34), was limited in application to the Metropolis, but its application is extended to the country by the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), s. 7. This was the statute in force at the time of the conveyance of 1905 and by s. 7 it enables a gift of land to be made by such a body as the Poole Harbour Commissioners for the purpose of its being preserved as an open space.

[SIR WILFRID GREENE M.R. Do you say that any one but the covenantees have power to enforce the covenants in the conveyance ?]

Yes. It is contended that the Attorney-General can do so in the public interest. The only power conferred is to give and accept land for the purpose of an open space. The Open Spaces Act, 1906 (6 Edw. 7, c. 25), consolidates and to some degree extends the earlier Acts. Sect. 1 defines the meaning of local authority to include a municipal borough; s. 7 gives power to convey with or without condition for the purpose of being used as an open space subject to conditions requiring the local authority to hold the open space in trust for its enjoyment by the public; and s. 10 fixes the powers of a local authority in regard to an open space subject to the conditions on which it is acquired. It is contended, therefore, that the land was acquired as an open space and that having regard to s. 10 there is no power to use it for any other purpose.

[SIR WILFRID GREENE M.R. Do you say that s. 10 applies to land not bought under the 1906 Act?]

Yes. See s. 12; further, s. 5 of the Act of 1881 contained a similar provision. There is thus no power under the 1906 Act to erect buildings on an open space though there is no express prohibition.

The respondents rely on the Public Health Act, 1875. Sect. 176 has no application because it applies only to the purchase of land compulsorily. Sect. 164 gave any urban authority power to " purchase or take on lease lay out plant improve and "maintain lands for the purpose of being used as . . . . pleasure "grounds" and to make by-laws for the regulation of the land and to provide for the removal of any person infringing a by-law by their officer. That section again has no application to land given for use as an open space. Here the covenant in the conveyance was entered into by the corporation and is enforceable: *Stourcliffe Estates Co., Ld. v. Bournemouth Corporation.* (1)

[SIR WILFRID GREENE M.R. That case dealt with the enforcement by a covenantee only.]

As already stated it is contended that it can be enforced by the Attorney-General in the public interest, having regard to the Open Spaces Acts, and in particular s. 10 of the Act of 1906.

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(1) [1910] 2 Ch. 12.

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The power conferred by s. 10 to maintain and keep the open space in a decent state does not give power to erect a building.

[They referred to *Sevenoaks, etc., Ry. Co. v. London, Chatham & Dover Ry. Co.* (1); *Attorney-General v. Sunderland Corporation* (2); and *Paddington Corporation v. Attorney-General.* (3)

H. B. Vaisey K.C. and *C. R. R. Romer K.C.* for the respondents contended that s. 10 of the Act of 1906 conferred on the respondents ample powers to erect the caretaker's house they proposed.

[They were stopped.]

SIR WILFRID GREENE M.R. [stated the facts as above set out, and continued:] The first thing to notice about the conveyance of April 28, 1905, is that it is a document inter partes in respect of which the covenantees would be the proper persons to sue. It is faintly suggested in this case that in the circumstances, with which I shall presently deal, the Attorney-General is in some way entitled to enforce the provisions of this deed against the Council. I am unable to see how that comes about, and, speaking for myself, with all respect to the learned judge (who appears, but without giving any reason, to have formed a different view), I am unable to see, and no argument has been put forward which suggests to me an acceptable reason, why anybody but the covenantees, namely, the Commissioners, has got power to enforce the covenants in this document. Be that as it may, I can get that document out of the way by saying that in any event I am in entire agreement with the construction which the learned judge put on it. He put on it a construction which would enable the particular building with which we have to deal here to be placed on the land as being a thing reasonably ancillary to the use of the land for the purposes stated. If the document, contrary to my view, be of any relevance in this case, I agree with the learned Judge that there is nothing in it which would assist the plaintiff or enable the Harbour Commissioners, the covenantees, to complain of what is being done.

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(1) (1879) 11 Ch. D. 625.
(2) (1876) 2 Ch. D. 634.
(3) [1906] A. C. 1.

I now come to matters which are of more importance. At the date when the conveyance of April 28, 1905, was executed, there was in force an Act of Parliament—namely, the Open Spaces Act, 1887. That Act contained in s. 7 power to any corporation (other than certain corporations mentioned) which has power to sell land (which would include the Harbour Commissioners, who, it will be remembered, had power to sell surplus lands) for valuable or nominal consideration or by way of gift to convey land to any urban or rural authority "for the "purpose of the same being preserved as an open space for the "enjoyment of the public, and may so convey the same with or "without conditions, and the urban or rural authority may accept "such open space, and, if conditions are imposed, subject to such "conditions, and such open space shall be deemed to be an open "space within the meaning of the principal Acts and this Act." I should say here that the Act of 1887 followed on certain other Acts—notably the Metropolitan Open Spaces Act, 1881, which only applied to the Metropolis—and it, in effect, extended to the whole of the country the powers which had previously been confined to the Metropolis. The effect of s. 7 was to give to the Harbour Commissioners a power which they did not have before—namely, to give away their land for the purposes specified. It also empowered the corporation to accept the land.

I should also refer to the definition of an open space, which is imported into the Act of 1887 from the Act of 1881. That definition is as follows: "'Open space' means any land "(whether inclosed or uninclosed) which is not built on, and "which is laid out as a garden or is used for purposes of recrea-"tion or lies waste and unoccupied; but shall not include any "inclosed land which has not a public road or footpath com-"pletely round the same." It is said by Mr. Roland Burrows that the relevant Acts of Parliament are the Open Spaces Acts, those being the only Acts under which the grantors, the Poole Harbour Commissioners, were entitled to grant, and the grantees, the Corporation, were entitled to accept, the land on the conditions specified and for the purposes specified. The learned judge took the view that the Corporation at any rate had power under the relevant sections of the Public

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Health Acts to accept the property for the purposes specified and on the conditions specified. It would appear that before Farwell J. the Open Spaces Acts were not seriously discussed, and accordingly he did not have the advantage of having the relevant provisions of those Acts called to his attention in the way in which they have been called to our attention here. It appears to me that the Open Spaces Acts are the relevant Acts to look at in this case, being the Acts under which the powers to grant and to accept, which were exercised in this case, seem to me to have been given. At any rate, that is the way in which the case has been argued before this Court, and I propose to confine myself to that argument. I should, perhaps, add this, that if the sections of the Public Health Act to which the learned judge referred as containing the powers and obligations of the Council in respect of this land were the relevant ones, I should have formed the same opinion as he formed—namely, that under those provisions the Corporation of Poole have power to do what they are proposing to do. I shall, however, now say no more about the Public Health Acts, but confine myself to an examination of the argument on the Open Spaces Acts.

The other section to which I said I would refer is a section in the Act of 1881 (s. 5), which describes the duties and powers of a local authority acquiring land as an open space. That section is imported (by s. 5 of the Act of 1887), like the other section, into the Act of 1887. It provides that the authority may take and hold any open space, and continues : " Any "estate or interest in or control over any open space . . . . "acquired . . . . under the provisions of this Act, shall be held "and administered by such board or vestry "—now extended to other authorities—" in trust to allow, and with a view to, "the enjoyment by the public of such open space . . . . in an "open condition, free from buildings and under proper control "and regulation, and for no other purpose . . . . and the board "or vestry shall maintain and keep the same in a good and decent "state, and may inclose or keep the same inclosed with proper "railings and gates, and may drain, level, lay out, turf, plant, "ornament, light, seat, and otherwise improve the same, and "do all such works and things, and employ such officers and "servants, as may be requisite for the purposes aforesaid, or "any of them."

If what I have said is right, the Corporation of Poole, when they accepted this conveyance, became subject to the statutory duties, and entitled to exercise the statutory powers, laid down in that section of the Act of 1881, and the main question turns on the true construction and effect of that section, or, rather, the section which has now replaced it in the consolidating and amending Act. That Act is the Open Spaces Act, 1906. It consolidates and amends the existing law, but the only matters to which I need call attention in it are two. First, by s. 20, the definition of " open space " is altered, and now reads as follows: "In this Act, unless the context otherwise requires— "The expression ' open space ' means any land, whether in-"closed or not, on which there are no buildings or of which not "more than one-twentieth part is covered with buildings, and "the whole or the remainder of which is laid out as a garden "or is used for purposes of recreation, or lies waste and un-"occupied." Accordingly, a space may now be an open space within the meaning of the Act provided that not more than one-twentieth part of it is covered with buildings, and in spite of the existence of such buildings. The other alteration of importance is that in s. 10 (the section corresponding to that part of s. 5 of the Act of 1881 which lays down the duties and gives the powers of the acquiring authority) the obligation to maintain in an open condition, free from buildings, disappears, and the duty now reads as follows: " (*a*) hold "and administer the open space . . . . in trust to allow, and "with a view to, the enjoyment thereof by the public as an open "space within the meaning of this Act and under proper control "and regulation and for no other purpose; and (*b*) maintain and "keep the open space . . . . in a good and decent state." Then follow the powers to enclose, improve, drain, and so forth " and do all such works and things and employ such officers "and servants as may be requisite for the purposes aforesaid or "any of them," as in the Act of 1881.

The actual condition of the piece of land with which we are concerned is that a portion of Sandbanks has been laid out as a recreation or sports ground, with a bathing establishment, and so forth, and a number of bathing huts, a bathing pavilion, grass paths, flower beds, trees and shrubs, a café, some asphalte walks, a car park, and a putting green. The portion of the total area at present actually built upon we were told is ·542 of an acre. That ·542 of an acre is about one twenty-second of the whole, and that figure, as I understand it, would include the built-on portion if and when this new building is built. Accordingly, if this new building is constructed, taking the land as a whole as it was acquired, less than one-twentieth will be covered with buildings, and it will accordingly remain an open space within the definition clause, so far as this clause carries us.

Before I come to a closer examination of s. 10 of the Act of 1906, I should complete the history by referring to another matter. There was passed in the year 1919 a local Act of Parliament, the Poole Corporation Act, 1919, which empowered the Corporation to effect certain improvements, and to purchase certain foreshore and certain other land. In s. 39 they were empowered to set apart those lands so acquired as pleasure grounds, and to erect and maintain thereon, and on the lands at Sandbanks known as the Sandbanks Recreation Ground, being the land which the Corporation acquired in 1905, " bathing "and other huts and similar structures tents booths and stalls." Power is given to let them, and by s. 40 there is power to erect on the new lands which they were going to purchase, and on the Sandbanks Recreation Ground, " bathing pools baths shelters, "pavilions and conveniences," and to take rent. Then comes s. 41. For the protection of the neighbouring owners on the promontory on which this land is situate there is a provision that the Corporation are not to exercise on the Sandbanks Recreation Ground, except within an area of four acres, the powers conferred by ss. 39 and 40. I may say that many of the things put on the land which I have described were put there in exercise of the powers conferred by this Act, and also that the land on which they have been placed does not exceed the four acres, which is the limit permitted under this protecting clause.

There is another limitation that no erection is to be placed within 150 feet of the western boundary or within 180 feet of the eastern boundary. That has been complied with. Then there is a provision that " No erection placed under the powers of this "Act upon the Sandbanks Recreation Ground shall exceed in "height 14 feet." That is not a section which concerns the present building, because the present building is not being erected under the powers of the private Act of 1919. Sect. 88, which is a saving section, says this : " All powers, rights and "remedies given to the corporation by this Act shall (except "where otherwise expressly provided) be deemed to be in "addition to and not in derogation of any other powers, rights, "or remedies conferred on them or on any Committee appointed "by them by Act of Parliament, charter, law or custom." It empowers the Corporation to exercise such powers as if the Act had not been passed.

Turning back to the section round which the controversy really turns—namely, s. 10 of the Open Spaces Act, 1906, the argument which is presented on behalf of the appellants is to this effect. It is said that the section imposes on a local authority which has acquired an open space an obligation to keep that space as an open space, in this sense, that nothing must be done with regard to any portion of it which would prevent the public from freely having access to such portion, because it is said that once you prevent the public setting foot on a part of such a space it is no longer open. It is said that that is the governing object and purpose of the section, and that the powers with regard to maintenance, the powers to do works and things necessary " for the purposes aforesaid," must be read subject to that overriding obligation to keep the land open.

It seems to me that there is more than one answer to that argument. First of all, it is to be observed that the obligation is an obligation to " hold and administer the open space . . . . "in trust to allow, and with a view to, the enjoyment thereof "by the public as an open space within the meaning of this Act." " An open space within the meaning of this Act " still remains an open space notwithstanding that one-twentieth of it may be

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covered with buildings, and the reason why that definition of "open space" was put there seems the pretty obvious one that, as the law stood before, the definition, coupled with the prohibition in s. 5 of the Act of 1881 on the erection of buildings, would have made it impossible to erect on any open space any building which might be necessary or desirable for properly looking after an open space or adding in some way to its amenities as such.

It seems to me, therefore, that the erection of a building—not any sort of building, but a building which is connected with and ancillary to the enjoyment of the land as an open space—does not contravene the provisions of s. 10, at any rate in a case where the result is still to leave nineteen-twentieths at least open and uncovered by buildings. I myself attach considerable importance to the circumstance that the Legislature, when it passed the Act of 1906, deliberately omitted the words "in an "open condition free from buildings." By so doing it appears to me to cut the ground from under the argument presented to us that the obligation to maintain as an open space must be construed as an obligation not to put on it anything which would prevent the public having access to every portion of the open space.

Quite apart from those considerations, there seems to me to be another answer to the argument, and it is this. In an Act of Parliament framed for the purposes for which this Act is framed, and having regard to the language of s. 10 read as a whole, it appears to me that the language used must include a power to do anything which is properly and reasonably necessary to enable the public to enjoy the land as an open space, and if the doing of something is reasonably necessary or reasonably desirable for that purpose, it appears to me that the power to hold the land with a view to the enjoyment by the public as an open space would include the power to do that thing. But however that may be, the matter, I think, is put beyond any possibility of doubt by the express language of the section, because having imposed on the Corporation the duty of keeping the open space under proper control and regulation, and given power to plan, and so forth, and improve it,

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express power was given to " do all such works and things "and employ such officers and servants as may be requisite for "the purposes aforesaid or any of them." That, in my judgment, gives power to erect a building provided its erection is a thing which is requisite for any of the purposes, among others, of maintaining the land as an open space for the enjoyment of the public and keeping it under proper control and regulation.

The section must be read reasonably as a whole, and on its true construction it appears to me that the language is really beyond question in that respect. The contrary view would lead to the most extraordinary results. It is said in this case that, if it is necessary to have a caretaker on the premises, he can live off the premises and patrol the place at night if his presence is there required. During the argument in this case I put this : " Suppose that it was necessary, or it was thought "necessary, for the men employed on the place to have a "mess-room in which during the day they could have their meals, "the erection of such a building, which would be private to the "men, would undoubtedly remove from access by the public the "piece of ground which it occupied." It seems to me impossible to argue that a thing of that kind, assuming that it is requisite—and that is a question of fact in each case—would not be a work " requisite for the purposes aforesaid," and to read the obligation to maintain as an open space as excluding the power to erect a structure of that sort appears to me to be putting on the section a hopelessly strained construction.

That brings me to the question of fact. Is the building here " requisite for the purposes aforesaid," for the proper control and regulation, and so forth of the open space ? On that there is a certain amount of evidence, with which I do not propose to deal in detail, but it leaves no doubt in my mind that the proper conclusion of fact is that the erection of this building in the circumstances, and having regard to all the facts of the case, is " requisite for the purposes aforesaid," or some of them. Putting the matter quite concisely, it is found necessary—or, at any rate, if not necessary (because nothing is really necessary), necessary from the practical point of view—to have on the premises permanently by day and

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night a responsible supervisor to see that nothing is done which ought not to be done. Various things may happen during the night. Fires may break out, or persons unauthorized may find their way in and conduct themselves in ways in which they should not, whether by injuring property or doing other things, and the Corporation took the view—and in the circumstances reasonably and properly took the view—that the proper way of protecting this place from happenings of that sort was to have there a permanent caretaker to see that everything was done properly.

In those circumstances it appears to me that the erection of this house is a proper exercise of the powers of the Corporation. If they were to build a house for some other purpose, to let it to a visitor, or something of that kind, of course it would be right outside the section, but on the facts of this case it appears to me quite clear that the matter comes within the section, and that the Corporation are acting within their statutory powers.

The result is (although on grounds different from those adopted by the learned judge, who had not had his attention directed to the argument which we have had presented to us here) that this appeal fails and must be dismissed, with costs.

Romer L.J. I agree. It is, I think, quite plain that no one but the covenantees who were parties to the deed of April 28, 1905, can enforce the covenants that were then entered into by the Poole Corporation. I am certain that Farwell J. did not intend to decide anything to the contrary. He considered the question, no doubt, whether what the Poole Corporation are now doing was a breach of the covenants, and, having come to the conclusion that they were not acts in breach of those covenants, he said this : " If that which the Corporation are proposing to do—namely, the erection of this house in "question, is a breach of the covenant in the conveyance, the "Corporation must be prevented from proceeding with that "erection." I think, when he used those words, that he was momentarily forgetting that the plaintiff in the action was not a covenantee in the deed.

It being quite unnecessary, therefore, to consider the covenants contained in that deed, it is plain that if the plaintiff is to succeed in this action it must be because he can show that what the defendants are doing is in breach of their statutory obligations imposed upon them by s. 10 of the Open Spaces Act, 1906. That section provides, applying it to the present case, that the Poole Corporation shall (*a*) hold and administer the Sandbanks Recreation Ground " in trust to allow, and with "a view to, the enjoyment thereof by the public as an open space "within the meaning of this Act and under proper control and "regulation and for no other purpose; and (*b*) maintain and keep "the open space . . . . in a good and decent state." The section ends with these words, " and may . . . . do all such other works "and things and employ such officers and servants as "may be requisite for the purposes aforesaid or any of them."

The way in which a section of the public will use an open space if wholly uncontrolled is painfully well known to each of us. If such persons were allowed to roam over Sandbanks at all hours of the day and night uncontrolled, I am quite sure that if other members of the public went there at all it certainly could not be said of them, within the words of s. 10, that they were "enjoying" the place as an open space. Further, it is perfectly plain that it would not be possible to say of Sandbanks that it was kept in a good and decent state. The Corporation, realizing that, have come to the conclusion that there should be somebody at all times on Sandbanks who can exercise the necessary control over the public, and it is plain that if a person is to be there at all times to exercise that control he must be provided with somewhere where he can live. The Corporation accordingly propose to erect a small bungalow on a very small portion of this land, and, in my opinion, are perfectly entitled so to do.

I will only add this. In exercising the power conferred by the last words of s. 10, the Corporation must do so consistently with the preservation of Sandbanks as an open space within the meaning of the Act—that is to say, must not cover more than one-twentieth of the area of Sandbanks with buildings.

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I agree that this appeal fails and should be dismissed, with costs.

MacKinnon L.J. I agree.

Appeal dismissed.

Solicitors: *Arthur S. Joseph & Co.; Sharpe, Pritchard & Co., for Wilson Kenyon, Poole.*

W. I. C.

In re LEGH'S SETTLEMENT TRUSTS.

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[1936. L. 586.]

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Power of Appointment—Special power—Exercise by will—Appointment to A and B for their joint lives with remainder to the survivor for life—A and B not lives in being at time of creation of power—Contingent gift—Perpetuity.

When in exercise of a special power of appointment a testator makes an appointment of a share of personalty to two objects of the power for their joint lives and after the death of either of them to the survivor for life and they were not lives in being at the date of the creation of the power of appointment, the reversionary life interest of the survivor is a contingent interest and therefore void as contravening the rule against perpetuities.

Whitby v. *Von Luedecke* [1906] 1 Ch. 783 followed.

APPEAL from Luxmoore J.

By a deed of arrangement and re-settlement (hereinafter called the re-settlement), dated October 2, 1891, and made between John Pennington Legh of the first part, John Robert Pennington Legh (hereafter called the testator) of the second part, and the Rev. E. P. Hathaway and H. Rose (the original trustees) of the third part, which was made supplemental to a deed (called the Principal Indenture) dated February 14, 1874, and made between John Pennington Legh of the first part, Emily Jane Legh (his wife) of the second part, and the original trustees of the third part, it was witnessed that John Pennington Legh released the property subject to the trusts of the principal indenture from the power of appointment among his issue vested in him by the principal indenture and reduced the power reserved to him to appoint a yearly sum of 1000*l.* in favour of his wife during her life or for any less period as therein mentioned; and it was thereby agreed and declared that the trustees of the principal indenture should thenceforth make provision for the testator during the life of John Pennington Legh as therein mentioned and from and after his death and subject as aforesaid should hold the trust funds, as well the income as the capital, upon

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trust to raise the sums therein mentioned, to be held for the benefit of the persons therein mentioned, and to raise and appropriate the sum of 15,000*l.* for the portion of the testator's sister, Ruth Isabel Legh, and subject thereto to hold the residue of the trust funds and the income thereof upon trust to pay the income thereof to the testator during his life and after his death to hold the capital and income thereof in trust for all or such one or more exclusively of the other or others of the issue of the testator whether children or remoter issue at such time and if more than one in such shares and generally in such manner for the benefit of such issue or one or more of them as the testator should by deed, revocable or irrevocable or by will or codicil, appoint, and in default of and until and subject to any such appointment in trust for all or any the children or child of the testator who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under that age and if more than one in equal shares, with a provision for hotchpot.

John Pennington Legh died on June 3, 1894. The testator had issue five children and no more—namely, John Alan Pennington Legh, Thomas Legh, Agnes Huskinson, William Venables Legh and Margaret Cowie. By a deed of appointment dated April 8, 1901, the testator exercised the power of appointment given to him by the principal indenture and the re-settlement (hereinafter together referred to as the settlement) by apportioning one third of the trust funds subject to the trusts of the settlement (hereafter called the settlement funds) in favour of Thomas Legh. In 1911 the Public Trustee became and still was the sole trustee of the re-settlement. Margaret Cowie predeceased the testator, having had issue two children and no more—namely, David Ian Cowie and Jennifer Jean Cowie, who were born on March 13, 1929, and May 12, 1931, respectively. Emily Jane Legh died on December 3, 1935.

The testator died on March 5, 1935, having by his will dated March 8, 1933, and proved on June 21, 1935, by the Public Trustee, the sole executor and trustee, further exercised the power of appointment conferred on him by the settlement. Clauses 18 and 19 of the will related to an apportionment of five-sixths of the settlement funds to three of his children, J. A. P. Legh, Thomas Legh and Agnes Huskinson, as therein mentioned, with a provision that Thomas Legh should bring into hotchpot the share of the settlement first apportioned to him by the deed of April 8, 1901.

By cl. 20 the testator, in further exercise of the same power, directed and appointed that the settlement trustee should stand possessed of and retain the remaining one equal sixth part of the settlement funds upon the trusts following—namely :

" (i.) Upon trust during the joint lives of my said grandson "and granddaughter, David Ian Cowie and Jennifer Jean "Cowie to pay the income thereof to them in equal shares "as tenants in common and after the death of either of them "to pay the whole of the income thereof to the survivor of "them during the residue of his or her life but so that my "said granddaughter shall not during twenty-one years "from my death have power to anticipate the half or the "whole (as the case may be) of the income payable to her "under this present trust.

"(ii.) From and after the death of the survivor of them my "said grandson and granddaughter in trust as to the capital "and future income thereof for my said sons John Alan and "Thomas absolutely in equal shares."

This summons raised (amongst others) the question whether, in the events which had happened, the trust declared in cl. 20 of the testator's will of the income of the share of the settlement fund between the death of whichever of the defendants David Ian Cowie or Jennifer Jean Cowie died first and the death of the survivor of them was valid and effective or void as infringing the rule against perpetuities.

Luxmoore J. declined to deal with this question as being a future question.

The defendants David Ian Cowie and Jennifer Jean Cowie by their guardian ad litem appealed. The appeal was heard on July 6 and 7 and judgment was given on July 30, 1937.

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Lindsay Jopling for the appellants. The gift to the survivor of the appellants during the residue of his life is not void under the rule against perpetuities as stated in Gray on Perpetuities, 3rd ed., p. 174. That rule is that no interest is valid unless it vests within twenty-one years of the death of a life in being. The question really turns on whether the gift to the survivor of the appellants is a vested or contingent interest. It is contended that it is a vested interest in remainder. It is as if the trusts were to each child during his life of a moiety of the income of the one sixth with remainder to the other of the two children of that moiety during his life. The effect of that would be that the survivor of the children would on surviving have an interest in the entirety of the share for the reminder of his life. If the gift had been framed in this way all the interests would clearly have been vested interests and it is contended that the gift as it appears in the will does not import a contingency. A gift to A for life and then to B for life is valid and the condition that B must survive A in order to take does not import a contingency. It would be different if the gift over to B was contingent on C surviving A.

The case which creates the difficulty in the present case is *Whitby* v. *Von Luedecke* (1), which is really indistinguishable.

[ROMER L.J. The difficulty here is imported by the description of the person to take as the survivor of the appellants. It is not as if the gift in remainder was to a named person.]

It is just as if each had an immediate vested interest in one moiety and an interest in remainder in the other moiety.

Whitby v. *Von Luedecke* (1) was criticized in Jarman on Wills, 7th ed., vol. i., p. 324: see, however, Gray on Perpetuities, 3rd ed., p. 284. *Whitby* v. *Von Luedecke* (1) was also criticized but followed by Eve J. in *In re Samuda's Settlement Trusts.* (2) The decision in *In re Crichton's Settlement* (3) is really distinguishable, as in that case there was a condition of marriage imported. In *Gooch* v. *Gooch* (4) Lord Cranworth seems to have taken a different view from that in *Whitby's* Case. (1)

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(1) [1906] 1 Ch. 783.

(2) [1924] 1 Ch. 61, 66.

(3) (1912) 106 L. T. 588.

(4) (1853) 3 D. M. & G. 366, 383.

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[ROMER L.J. The value of the dictum is destroyed by its being based on a view of the law that no longer holds good.]

Reliance is placed on what Eve J. said in *In re Samuda's Settlement Trusts.* (1) The reasoning of Buckley J. in *Whitby* v. *Von Luedecke* (2) is really not logical. [He also referred to Gray on Perpetuities, 3rd ed., p. 84, and Jarman on Wills, 7th ed., vol. ii., p. 1331.]

J. G. Craufurd for William Venables Legh as the person taking in default of appointment. The rule in *Whitby* v. *Von Luedecke* (2) should be followed, as has been done since in the case already cited and without giving any reasons in two Irish cases, *In re Ramadge's Settlement* (3) and *In re Bromhead's Trusts.* (4) The dictum of Lord Cranworth in *Gooch* v. *Gooch* (5) has been commented on in *In re Ashforth.* (6) The Court cannot have regard to another way in which the bequest could have been made so as to validate it. The form of words here clearly imports a contingency.

Wilfrid Hunt for the Public Trustee.

J. Neville Gray, R. R. A. Walker and *C. Montgomery White* appeared for other defendants to the summons who were not interested in the question.

Cur. adv. vult.

1937. July 30. SIR WILFRID GREENE M.R. The question in this appeal is one which the learned judge did not decide. But as the event which gives rise to it is one which must inevitably happen and as all parties were anxious to have their rights ascertained, we decided to deal with it now and so save expense in the future.

The testator by his will exercised a special power of appointment conferred upon him by a deed of October 2, 1891. By clause 20 of his will he appointed a sixth part of the settled funds in favour of two grandchildren, the children of his deceased daughter Mrs. Cowie. The trusts declared by that appointment were as follows: " Upon trust during the

(1) [1924] 1 Ch. 61, 66.
(2) [1906] 1 Ch, 783.
(3) [1919] 1 I. R. 205.
(4) [1922] 1 I. R. 75.
(5) 3 D. M. & G. 383.
(6) [1905] 1 Ch. 535, 541.

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"joint lives of my said grandson and granddaughter David Ian "Cowie and Jennifer Jean Cowie to pay the income thereof to "them in equal shares as tenants in common and after the death "of either of them to pay the whole of the income thereof to the "survivor of them during the residue of his or her life but so "that my said granddaughter shall not during twenty-one years "from my death have power to anticipate the half or the whole "(as the case may be) of the income payable to her under this "present trust." Then follows a disposition of the capital upon the death of the surviving grandchild.

Neither of the two grandchildren was alive at the date of the deed which conferred the power; and by reason of that fact the question arises whether the gift of the whole income to the survivor of them is void for perpetuity.

The will must be construed without reference to the rule against perpetuities. If upon the true construction of the language used the legal character of the interest created is one which attracts the operation of the rule, it is immaterial that this result might have been avoided by the use of different language creating an interest different in legal character though the same in practical effect. Thus in a gift upon trust to pay the income to A during his life and after his death to transfer the capital to B if he shall be then living, B's interest is contingent and will fail if A's death is an event falling outside the limit permitted by the rule. On the other hand, if the gift to B is in terms absolute with a gift over in the event of his predeceasing A, his interest will be a vested one and the rule will not apply, notwithstanding that the practical result in the two cases will be the same. The rule is strict and highly technical in its operation and the temptation to construe words in such a way as to exclude its application is one which must be firmly resisted.

The question therefore which arises is whether upon the true construction of the will the interest in the whole income appointed to the surviving grandchild is contingent or vested. As a mere matter of words this question can have only one answer; for the word "survivor" in itself imports the contingency of survivorship. But it is said that this does not necessarily conclude the matter; and for the reason that an interest for life which is to take effect upon the happening of a given event, e.g., the death of a person to whom a prior life interest is given, in its very nature requires survivorship if it is to take effect at all and that the character of the interest remains the same whether the necessity for survivorship as a condition of taking be expressed or not. Thus it is said, and with truth, that in a gift in trust for A for life and after his death for B for life if he shall survive A, the addition of the words "if he shall survive A" does not make the gift to B contingent, since it merely expresses the inherent characteristic of B's interest—namely, that it can only be enjoyed if he survives A. The case would, of course, be quite different if the gift to B were a gift of corpus.

It is said that in the present case the words can be construed as an appointment of one moiety of the income to each grandchild for his or her life, and after his or her death to the other grandchild for his or her life, and that the expectant interest of each grandchild in the other's moiety is vested in spite of the fact that the condition of survivorship (which is in any event essential and inherent) is expressly attached.

This argument is attractive, but in my opinion unsound. The original interest given to the two grandchildren is an interest to them as tenants in common, the duration of their interest as such being the joint lives of the two. Upon the death of the first to die a new and different interest is given—namely, a life interest in the entirety. During the joint lives it is uncertain which of the two will survive to take that interest which is in consequence of necessity contingent in the case of each grandchild. The nature of the interest in the entirety which is appointed upon the death of the survivor appears to me to be in its essence something different from a continuation of the previous interest of the survivor in one moiety with a life interest in the other moiety added to it. If the property appointed had been real estate, the distinction would have been more apparent.

But I cannot leave the matter there without reference to

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certain authorities, particularly as the subject is one which has given rise to controversy. In *Whitby* v. *Von Luedecke* (1) Buckley J. had to deal with an appointment in terms substantially the same as those in the present case and he held that the appointment of the whole income to the survivor was contingent and therefore void for perpetuity. This decision, which has been twice followed in Ireland, has been criticized. One criticism was made by the learned editor of Jarman on Wills, Mr. Sweet (7th ed., vol. i., p. 324, note (*b*)). But his criticism was based on the fact that the decision was contrary to the view expressed by Lord Cranworth in *Gooch* v. *Gooch.* (2) Lord Cranworth's view, however, was itself based upon an argument which cannot to-day be supported. In *In re Samuda's Settlement Trusts* (3) a similar question came before Eve J., who followed the decision of Buckley J. although apart from that decision he would apparently have taken the other view. He said (4): "I cannot help thinking that the "nature of the interest ought . . . . to be ascertained by "considering the case of each daughter separately and not by "grouping them together, and if each daughter's interest is so "examined, the only contingency in the life interest in remainder "would be that which is already imported into the gift by the "use of the word 'survivors,' and which must necessarily be "implied in any gift of a life estate in remainder." I need scarcely say that in view of this difference of judicial opinion the question must be considered as one of difficulty. But for the reasons which I have given I think that the language precludes the separate treatment of each interest which Eve J. thought was permissible.

The decision of Neville J. in *In re Crichton's Settlement* (5) is of no real assistance as there was in that case the additional contingency of death without leaving issue.

There must accordingly be a declaration that the appointment of the life interest in the whole income to the survivor of the two grandchildren is void for perpetuity.

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(1) [1906] 1 Ch. 783.
(2) 3 D. M. & G. 366, 383.
(3) [1924] 1 Ch. 61.
(4) Ibid. 67.
(5) 106 L. T. 588.

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Romer L.J. Under and by virtue of an Indenture of Settlement dated October 2, 1891, John Robert Pennington Legh had a special power of appointment over certain trust funds in favour of his children and remoter issue. By his will, made on March 8, 1933, he directed or appointed in exercise of such power that a certain share of the said trust funds should be held upon trust during the joint lives of his grandson and granddaughter Ian David Cowie and Jennifer Jean Cowie to pay the income thereof to them in equal shares as tenants in common, and after the death of either of them to pay the whole of the income thereof to the survivor of them during the residue of his or her life. The question to be decided is whether the reversionary life interest appointed to the survivor is a vested or contingent interest. The question is of importance for this reason. Neither of the two appointees had been born at the date of the settlement taking effect. If, therefore, the reversionary life interest be contingent it will not necessarily vest within a life in being and twenty-one years thereafter, and will fail to take effect by reason of the rule against perpetuities. This circumstance, however, must be disregarded in answering the question. See *Pearks* v. *Moseley*. (1) If the interest would be regarded as contingent had the appointees been lives in being at the date of the settlement, it would be quite improper to treat it as vested merely because they were not. The temptation to do so is great, but it is a temptation that must be resisted. No one can doubt that, had the testator realized that by giving the survivor a contingent interest such interest must fail to take effect, he would have worded his disposition differently. He could, for instance, have avoided all difficulty by appointing one half of the share to the grandson for life with remainder to the granddaughter for life, and the other half to the granddaughter for life with remainder to the grandson for life. Where the words of a bequest or devise are legitimately capable of two constructions the Court will always be ready to adopt the one that will give effect to what may be thought to be the testator's real intentions. But if in the present case the words used by the testator are only capable of being read as conferring a contingent life interest upon the survivor of his two grandchildren, then that must necessarily be assumed to have been his intention. By so construing them, therefore, his words will be given the meaning that he intended them to have. His intention that the reversionary life interest should take effect will no doubt be defeated. But it will have been defeated by the rule against perpetuities, and not by the Court of construction.

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(1) (1880) 5 App. Cas. 714, 719.

Now, in my opinion, the words that the testator has used can only be regarded as creating a contingent life interest in the survivor of the two grandchildren. To hold otherwise would be to depart from well settled principles of law. Fearne, we know, divided contingent remainders, into four classes, the fourth of which is, "Where the person to whom the "remainder is limited is not yet ascertained or not yet in being." (See Fearne on Contingent Remainders, 10th ed., vol. 1, p. 5). One of the examples of contingent remainders of this class given by him is that of the limitation of an estate to two for life with remainder to the survivor of them in fee. "The remainder," says Fearne, "is contingent for it is uncertain who will be the survivor." (Ibid, p. 5.) The fact that one of them must be the survivor is, of course, immaterial. It is said, however, on behalf of the two grandchildren that though this is so in the case of a limitation to the survivor in fee, it is different where the limitation is to the survivor for life. Now it is true that in some cases a limitation that seems at first sight to be contingent is in reality vested. Such a limitation is to A for life with remainder to B for life if B shall survive A. The remainder, though in terms expressed to take effect only upon a contingency, is neverthelesss a vested remainder. The reason of this is that the words of contingency are treated as applying not to the vesting of the interest in remainder, but to the vesting of the interest in possession. "Where an estate in "remainder is limited in terms of contingency on the happening "of certain events, and the events described are precisely "those on which, the preceding estates having determined, "it will fall into possession, it is construed to be, not a contingent

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"gift, conditioned to take effect on these events, but as a devise "immediately vested, the possession of which is necessarily "dependent on the events in question": Powell on Devises, 3rd ed., vol. ii., p. 217. In the case of *Leadbeater* v. *Cross* (1), a testator had devised an estate to his grandaughters in tail with cross remainder between them, and in case the granddaughters should all die without issue, leaving their father and mother surviving, he devised the estate to the father and mother and the survivor of them for life and after their death to certain persons in fee. Both father and mother died before the death of the surviving granddaughter. If therefore the words, "leaving the father and mother or either "of them surviving" imported a contingency, such contingency would have applied equally to the ultimate gift in fee. It was held, however, consistently with the principle stated in Powell, that the words of contingency merely applied to the vesting in possession of the interests of the father and mother and accordingly that the ultimate limitation in fee took effect. It is, perhaps, unnecessary to point out that the question whether the limitation to the survivor of the father and mother was contingent or not did not arise.

But this principle cannot avail the grandchildren in the present case. The reversionary interest, being a life interest, obviously cannot vest in possession unless the one to take it is living when the preceding interest determines. But until that event happens it is impossible to say which of the two will take it. The contingency expressed in the word "survivor" is one, therefore, that applies to the person to take and consequently to the vesting in interest and not merely to the vesting in possession.

It only remains to consider some of the authorities that were cited to us. In *Whitby* v. *Von Luedecke* (2) a testatrix, in exercise of a special power of appointment, directed that the income of the property subject to the power should be equally divided between her two daughters A and L during their respective lives, and that in the event of the death of either the survivor should receive the whole income during

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(1) (1876) 2 Q. B. D. 18.

(2) [1906] 1 Ch. 783.

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her life. Neither of the daughters was a life in being at the date of the settlement, and Buckley J. held that the survivor took a contingent and not a vested estate and that the appointment to her was void as contravening the rule against perpetuities. It was contended before him that the will should be read as though it said that when A died L should take a life interest in the entirety and that when L died A should take a life interest in the entirety, and that those two interests in remainder would be vested interests. As to this contention the learned judge said (1): " Now it seems "to me that this is impossible. Every vested interest must "be one which may, not necessarily which must, vest in "possession. If that be true, it is obvious that the two estates "of which I have spoken are such as that one of them—you "cannot say which—certainly cannot vest in possession, and "none the less because it is impossible to say which of the "two will fail so to vest." This at first sight might seem to indicate that the learned judge was of opinion that, if the words of the will were read in the way that was suggested, the two interests in remainder would not be vested. But I do not think that this was what he meant. I think that he was merely rejecting the suggested construction. For he continued as follows: " There is a difference, as it seems to me, between "these two things—a vested estate for life, which may fail "to fall into possession by reason of the life tenant dying before "the event happens which gives possession, and the gift of a "contingent estate for life. What I have here is a gift under "which, as I understand the language, only the survivor of "the two ladies will be entitled to some estate under these "words, ' in the event of the death of either the survivor shall "receive the whole,' and I could not at the mother's death "have said which of the two it was. It seems to me that that "was a contingency—a contingent estate. I cannot read the "instrument as creating two vested estates, one of which must "fail, and the other of which must take effect. I think it is a "contingent estate." In this conclusion I respectfully concur.

This decision was followed, though reluctantly, by Eve J.

(1) [1906] 1 Ch. 788.

in *In re Samuda's Settlement Trusts.* (1) In that case, which was an appointment to three daughters and the survivors of them during their lives, Eve J. said (2): "I cannot help "thinking that the nature of the interest ought . . . . to be "ascertained by considering the case of each daughter "separately and not by grouping them together, and if each "daughter's interest is so examined the only contingency in the "life interest in remainder would be that which is already "imported into the gift by the use of the word 'survivors,' "and which must necessarily be implied in any gift of a life "interest in remainder." With all respect to the learned judge I cannot agree that the case of each daughter ought to have been considered separately. The testator had not considered them separately, and I can see no justification for the Court doing what the testator had omitted to do.

The case of *Whitby* v. *Von Luedecke* (3) has, however, received some adverse criticism in Jarman on Wills, 7th ed., vol. i., p. 324. It is there said that the decision in the case seems erroneous, being inconsistent with the doctrine laid down by Lord Cranworth in *Gooch* v. *Gooch.* (4) In that case Lord Cranworth said that a trust in a will for four persons for their respective lives, such persons being unborn at the date of the death of the testator, with benefit of survivorship among them would be a perfectly good trust. But he then added his reason for so thinking. He said, "because the four "with the person who had the fee could convey the fee." With the greatest deference I venture to think that this is no reason for regarding the trust in favour of the survivors and survivor of the daughters as valid. The fact that the persons entitled in remainder can, by joining with the persons entitled to the particular estate, convey the fee does not necessarily show that the remainders are vested. If land be devised to A for life remainder to B for life and if B die before A remainder to C for life; A and B and C and the heir-at-law can together convey the fee. Yet C's life estate in remainder is indubitably contingent only. The remainder is, indeed, one of the two examples given by Fearne of contingent remainders of his second class. (See p. 7.) It may be, as suggested by Farwell J. in *In re Ashforth* (1), that Lord Cranworth was really thinking of a joint tenancy. I cannot at any rate regard his dictum as an authority that an express limitation to the survivors of several unborn tenants for life is valid.

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(1) [1924] 1 Ch. 61.
(2) Ibid. 67.
(3) [1906] 1 Ch. 783.
(4) 3 D. M. & G. 366, 383.

A declaration must accordingly be made in the terms indicated by the Master of the Rolls.

MACKINNON L.J. I agree. The question is whether the direction in clause 20 in this will is or is not void as infringing the rule against perpetuities. And that question depends on whether the future interest of one or other of the two grandchildren in the whole of the sixth part of the settlement was, on the death of the testator, a contingent or a vested interest.

As I understand the rules of law upon such a problem, a future estate or interest is vested when there is a person who has an immediate right to that interest upon the cessation of the present or previous interest. But a future interest is contingent if the person to whom it is limited remains uncertain until the cessation of the previous interest.

Secondly, whether a future interest is vested or contingent depends on the actual language used in the instrument under consideration. By the use of apt, but different, language that which is in terms contingent might so be expressed as to produce exactly the same result, but with a vested instead of a contingent interest. For instance, the two provisions—(1.) Gift to A for life, with remainder to his children who survive him, and (2.) Gift to A for life, and remainder to his children, but if any child dies in A's lifetime his share shall go to the survivors—achieve exactly the same result. But under (1.) the interest in the remainder is contingent, while under (2.) the interest of each child is vested, though liable to be divested by his death. For if, by the language used the conditional element is involved in the ascertainment of the remainderman, the remainder is contingent. If, however, by the language used a vested interest is created subject to its being divested on a future event, then the remainder is vested.

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(1) [1905] 1 Ch. 541.

But though it is possible by the use of apt but different language to express that which in terms creates a contingent gift so that it could in those other terms create a vested interest, it is not legitimate to alter the language in this way. The question must be decided upon the actual language used.

I need not read again the words of clause 20 in this will. Prima facie they seem to me to be a gift of the whole income to either A or B upon a contingency—namely, whether A or B dies first. No doubt by the use of slightly different language exactly the same result could have been achieved, for example, if the direction were to divide the income into halves, pay half to A and half to B, and on the death of either thenceforward to pay his half to the other. In that case no doubt each might be said to have a vested interest in the half of the other upon the other's death. The change of language is slight, but it is a change. The language used is a direction to pay the whole of the income to the survivor. And I cannot escape the conclusion that this is a contingent and not a vested interest in the survivor, that is contingent upon the chance of his surviving.

The case of *Whitby* v. *Von Luedecke* (1) is indistinguishable from this one. In that Buckley J. summed up his judgment in the sentence, " I cannot read the instrument as creating "two vested estates, one of which must fail, and the other of "which must take effect. I think it is a contingent estate." I come to the same conclusion, and I find myself unable to share the doubt as to the correctness of that decision expressed by Eve J. in *In re Samuda's Settlement Trusts.* (2)

Appeal dismissed.

Solicitors: *Waller, Mager & Cobbett*; *Holloway, Blount & Duke*; *Robins, Hay & Waters, for Lacey & Son, Bournemouth.*

H. C. G.

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(1) [1906] 1 Ch. 783.

(2) [1924] 1 Ch. 61.

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July 13, 14, 15.

In re REGISTERED TRADE MARK No. 530,535 OF BOOTS PURE DRUG COMPANY, LIMITED.

Trade Mark—Registration of mark as an invented word—Geographical name—Place of manufacture of similar goods—Not an invented word—Not adapted to distinguish—Trade Marks Act, 1905 (5 & 6 *Edw.* 7, *c.* 15), *ss.* 9, 11, 35—*Trade Marks Act,* 1919 (9 & 10 *Geo.* 5, *c.* 79), *s.* 7.

In 1932 an English Drug Company registered the word Livron as a trade mark in respect of tonic medicines for human consumption. They claimed to have invented the word and that it is a combination of the words liver and iron and used by them since August, 1932, to describe a tonic. Livron was, though this was not known to the English company at the time of registration, the name of a small French town, and a French company carrying on the manufacture of drugs had one of their factories at Livron.

In 1934 the French company applied to expunge the mark. The Assistant-Comptroller granted the application and Crossman J. upheld his decision. On appeal :—

Held : (1.) that the word was not an invented word so as to be registrable under s. 9, para. 3, of the Trade Marks Acts, 1905 and 1919 ;

(2.) that the word was according to its ordinary signification a geographical name and therefore not registrable under para. 4 ;

(3.) that the word was not distinctive of the registered proprietor's goods and therefore not registrable under s. 9, para. 5 ;

(4.) that even if the mark had been registrable under para. 3 or 4 the Registrar would, in view of the facts now proved, have been wrong not to exercise his discretion by refusing registration.

Per Sir Wilfrid Greene M.R. and MacKinnon L.J. : A word which is the name of a place in a foreign country is not registrable as an invented word under s. 9, para. 3, nor can the word when it bears no other meaning be registered under s. 9, para. 4.

Per Romer L.J. : A word wholly unknown to the ordinary Englishman may be an invented word, even though on investigation in some gazetteer or atlas it is found to be a place in a foreign country ; and that which is the name of a foreign place may be registered under s. 9, para. 4, if it has no significance to the ordinary Englishman.

APPEAL from Crossman J.

On March 29, 1932, Boots Pure Drug Company, Ld., registered the trade mark No. 530,535 consisting of the word Livron in Class 3 in respect of tonic medicines for human use. The mark was first brought into use in August, 1932, in connection with a preparation of extract of liver and iron. On March 5, 1934, the Société des Usines Chimiques Rhone-Poulenc applied to rectify the register by expunging the mark. The grounds of the application were that the trade mark consisted of a word which according to its ordinary significance was a geographical name, being the name of a town in the Drôme Department of France with a population of 4000 to 5000 persons, at which one of the French company's factories was situated and where the manufacture of chemical and medicinal preparations was carried on. The French company therefore alleged (*a*) that the trade mark was effected contrary to the provisions of s. 9, para. 4, of the Trade Marks Acts, 1905 and 1919 (1); (*b*) that the trade mark was not at the date of registration or at the date of the application adapted to distinguish the goods of the registered proprietors; (*c*) that the use of the trade mark by the registered proprietors was calculated to deceive and that its registration was effected contrary to the provisions of s. 11 of the Trade Marks Act; (*d*) that the registration and use of the trade mark was calculated to prejudice and interfere with the French company's business.

In support of the application a declaration was made by M. Rodolphe Pfister, director of the French company, that it was not until 1933 that the French company became aware of the registration of Livron and that they immediately took steps to have the mark removed first by negotiation and then by this application; that the name Livron was the name of a small town in France with a population at the date of registration of about 4000 persons and that the name appeared in two gazetteers in the British patent office library,

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(1) Sect. 9 of the Trade Marks Act, 1905, as amended by s. 7 of the Trade Marks Act, 1919, provides:—

"9. A registrable trade mark "must contain or consist of at "least one of the following es"sential particulars:— . . . .

"(3.) An invented word or "invented words;

"(4.) A word or words having "no direct reference to the "character or quality of the "goods, and not being according "to its ordinary signification a "geographical name or a sur"name;

"(5.) Any other distinctive "mark, but a name, signature, "or word or words, other than "such as fall within the descrip"tions in the above paragraphs "(1.) (2.) (3.) and (4.) shall not "be registrable under the pro"visions of this paragraph, "except upon evidence of its "distinctiveness."

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Lippincott's New Gazetteer, 1912, and Longman's Gazetteer of the World, 1895; that the French company were specialists in the manufacture of drugs and that one of their main factories was situated at Livron; and that the fact that they had a factory at Livron was stated in their catalogues, which were circulated in the United Kingdom.

For the registered proprietors there was first a declaration by the assistant secretary, Mr. Walter Williams, who stated that the word Livron was originated by them "as a newly "invented word, that is to say, a word which had no ordinary "significance in this country, but which would strike the British "public as a novel and newly coined word." In addition there were three declarations by persons with from thirty to forty years' experience of the drug trade who said that they had been familiar with the trade mark Livron, which had always been used in connection with a tonic marketed by Boots Pure Drug Company and that they associated the word only with such goods.

The Assistant-Comptroller allowed the application and ordered the mark to be expunged from the register on the grounds that Livron was, according to its ordinary significance, a geographical name, and that as when registered it could have no other meaning it was not a newly invented word; and further, that as at the time of registration there had been no user of the mark it could not be registrable under s. 9, para. 5.

Crossman J. dismissed an appeal from the Assistant-Comptroller's decision. He said that the view of the Assistant-Comptroller that Livron was not an invented word and did not come within s. 9, para. 3, of the Trade Marks Act, 1905, because it was a word already in existence, was supported by the decision in *In re Sir Titus Salt, Bart., Sons & Co.'s Application* (1), where the registration of Eboline as a trade mark was refused because Eboli was the name of an Italian town of 11,000 inhabitants and the mere addition of the common English termination "ne" was not sufficient to make the word an invented word. Further, he agreed with the Assistant-Comptroller in thinking

(1) [1894] 3 Ch. 166; 11 R. P. C. 517.

that the word was not registrable under s. 9, para. 4, because at the time of registration livron was a word whose only significance was geographical. This case was distinguishable from *In re Magnolia Metal Co.'s Trade Marks* (1), because the word magnolia was a word well known in the English language and had the well known meaning of a tree, shrub or flower, so that according to its ordinary significance it was not a geographical name. The Assistant-Comptroller had also held that the word livron was not adapted to distinguish the goods of Boots Pure Drug Company, Ld., and he could find no sufficient ground for differing from this view.

Boots Pure Drug Company appealed. The appeal was heard on July 13, 14 and 15, 1937.

K. R. Swan K.C. and *H. J. W. Bliss* for the appellants. The word Livron is an invented word within s. 9, para. 3, of the Trade Marks Act, 1905. It had no meaning within the knowledge of the appellants and was invented to describe a tonic compounded of liver extract and iron. The fact that it is the name of a place in France does not prevent its being a valid trade mark. It is desirable that applications for rectification should be made to the Court rather than to the Registrar, and the Court should not allow itself to be much influenced by any exercise by the Registrar of his discretion: see *In re Chesebrough Manufacturing Co.'s Trade Mark* (2) and *In re Burroughs, Wellcome & Co.'s Trade Marks.* (3) Livron at the time of registration was a word without meaning to the ordinary Englishman. The mere fact that the word appeared in certain gazetteers as the name of a place does not prevent the word being an invented word. This part of the appellant's case is assisted by *In re Sir Titus Salt, Bart., Sons & Co.'s Application* (4), a case decided under the Act of 1888.

Alternatively the word Livron was properly registered under para. 4 of s. 9 as "a word or words having no direct "reference to the character or quality of the goods, and not

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(1) (1897) 14 R. P. C. 265, 621.
(2) (1902) 19 R. P. C. 342.
(3) (1904) 21 R. P. C. 217.
(4) [1894] 3 Ch. 166; 11 R. P. C. 517.

"being according to its true signification a geographical name "or surname." The only possible ground on which this could not be so is that the word is "according to its true signification "a geographical name." The mere fact that it is a foreign geographical name is not enough: *In re Magnolia Metal Co.'s Trade Marks.* (1) That case was decided in 1888, before the words "according to its true signification" were introduced into the section, and they were probably introduced as a result of the decision in this case that "Magnolia" was a valid trade mark although it was the name of a foreign place, because to the ordinary Englishman it referred to a well known plant.

In *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (2) it was decided that solio was not disqualified from registration as an invented word although it was a word in the Italian language. So here the fact that Livron is the name of a foreign place does not prevent its registration as an invented word. The mere fact that that word appears in foreign dictionaries or in gazetteers does not give it a significance here. The proper construction of s. 9, para. 4, is that a word is not geographical unless it would be taken to be so by ordinary educated Englishmen: see per Parker J. in *Philippart* v. *William Whiteley, Ld.* (3), where the trade mark was Diabolo. Mere publication of the word in some gazetteers in this country is not enough to exclude it: see *In re Linotype Co.'s Application.* (4) The only other case actually dealing with a geographical name is *In re Sir Titus Salt, Bart., Sons & Co.'s Application* (5), where an application for the registration of Eboline was refused on the ground that Eboli was a town in Italy. There, however, it was held that the primary meaning of Eboli was geographical, and the decision there cannot stand since the *Solio* case. (6) Here it is contended that Livron is not according to its ordinary

(1) [1897] 2 Ch. 371; 14 R. P. C. 265, 621.
(2) [1898] A. C. 571; 15 R. P. C. 476.
(3) [1908] 2 Ch. 274, 278; 25 R. P. C. 565, 569.
(4) (1900) 17 R. P. C. 380.
(5) [1894] 3 Ch. 166; 11 R. P. C. 517.
(6) [1898] A. C. 571.

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signification a geographical name but is an invented word, and accordingly that the mark was registrable under paras. 3 and 4 of s. 9. Further the word was registrable as a distinctive mark within s. 9, para. 5. Distinctive meant adapted to distinguish, and the evidence here shows that the mark was adapted to distinguish: see *In re Cassella & Co.'s Application.* (1)

So, too, it is not a mark calculated to deceive within s. 11. The test is whether the registration of the mark will cause substantial difficulty or confusion in view of the rights of user by other traders. The French company suggest that the registration of Livron has caused substantial difficulty and confusion with their rights. But the only rights to be considered are those of traders in the United Kingdom. Thus a trader in this country can register a mark long in use on the Continent by a foreign trader: see *Impex Electrical, Ld.* v. *Weinbaum.* (2) Lastly, the Registrar has a discretion in regard to the registration of a mark; but if the mark was originally registered and not calculated to deceive in this country it should not be expunged.

[They also referred to *In re "Apollinaris" Trade Mark* (3) and *In re Van Duzer's Trade Mark.* (4)]

R. E. Burrell K.C. and *Kenneth Johnston* for the respondents. It is no doubt an unattractive idea that an English trader who bona fide registers a trade mark should have it taken away because it is the name of some remote spot on the earth's surface. But the facts here are that the appellants have registered as a trade mark the name of a place in a neighbouring country close to the main line from Paris to Marseilles and a place where the respondents had one of their main factories for the manufacture of precisely the class of goods in respect of which registration has been effected. Further, no case has been cited where a geographical name has been accepted for registration under s. 9, para. 4, or where it has even been suggested that such a place-name could ever be registered. Again, it is said that deception has not arisen since the registration, and therefore that the word is not calculated to deceive. It has to be remembered, however, in considering this question that the mark may have other uses in the future. It is not a question whether the mark as used on the carton or bottle produced is calculated to deceive. The mark was only in use for sixteen months before the date of the application to expunge it, and no evidence has been given of the turnover of the medicine or of expenses incurred in advertising the mark or as to the area served by the mark. Therefore if it comes in this case to a question of the exercise of the Court's discretion, there is no ground for exercising it in the appellants' favour. Further evidence of distinctiveness after the date of the application to register has been tendered, but even if it were receivable it would be useless. It appears from *In re Clark Son & Morland's Trade Mark* (1), where the trade mark in question was Glastonbury, that no geographical name or surname will be registered under s. 9, para. 5, without a body of evidence from all over the country proving distinctiveness. Further the question is peculiarly one for the Registrar. On all these grounds the mark was not registrable under s. 9, para. 5.

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(1) [1910] 2 Ch. 240; 27 R. P. C. 453, 459.
(2) (1927) 44 R. P. C. 405.
(3) [1907] 2 Ch. 178.
(4) (1887) 4 R. P. C. 31.

Again, it has been said that the onus after registration is on those desiring to expunge a registered mark. But even so, it is discharged if the Registrar is satisfied of the existence of facts which if known to him at the date of registration would have induced him to refuse registration. That is the position here.

Turning to the earlier paragraphs of s. 9, livron is not an invented word within para. 3. This is really established by the *Eboline* case (2), and that case is unaffected by the *Solio* case (3), which does not set out to define invented words, but does suggest some valuable tests. It is essential that the word should be newly coined, and it is impossible to say so of Livron. It is true that solio was registrable, but that is because its only meaning was that of a word in a foreign

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(1) (1936) 53 R. P. C. 413; 54 R. P. C. 234.

(2) [1894] 3 Ch. 166.

(3) [1898] A. C. 571.

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language; but if a man speaking English wishes to say that he is going to Livron, he can only do so by using that word. The name of a place is necessarily a word of the English language. It is of the essence of an invented word that it deprives no one of the use of a word of the language. The tests laid down in the *Solio* case (1) assist the respondents' contention. *In re Batt's Trade Mark* (2) was a case decided before the Act which introduced the invented word.

Again, livron was not properly registrable under s. 9, para. 4, for it is a word which in its ordinary signification is a geographical name. This follows for the very reasons given for the word not being an invented word. Reliance is placed on the *Magnolia* case (3); but there the word Magnolia had two meanings, and it was well known in this country not as a geographical name but as the name of a plant. Here Livron has only one meaning and that a geographical one.

Next the word is not registrable under s. 9, para. 5, for there is no evidence of distinctiveness. Registration was therefore ultra vires. The appellants relied on evidence of distinctiveness subsequent to the date of registration, but the test was whether the mark was distinctive when it was registered. Sect. 35, sub-s. 2, of the Act has no application here. The Court cannot look at ex post facto evidence: see *In re R. J. Lea, Ld.'s Application.* (4)

Further, the mark is calculated to deceive within s. 11, as the word might be taken to indicate that the goods came from Livron, and the danger is the greater because the respondents are manufacturing medicines at Livron. It must be remembered that medicines are of international interest.

Lastly, the Registrar has a discretion in regard to granting registration: see *In re J. & P. Coats, Ld.'s Application* (5) and *In re National Galvanizers, Ld.'s Application.* (6)

[They also referred to *In re Fanfold, Ld.'s Application.* (7)

Andrewes Uthwatt for the Registrar.

K. R. Swan K.C. replied.

(1) [1898] A. C. 571.

(2) (1889) 6 R. P. C. 493.

(3) [1897] 2 Ch. 371.

(4)]1913] 1 Ch. 446; 30 R. P. C. 216.

(5) (1936) 53 R. P. C. 355.

(6) (1920) 37 R. P. C. 202.

(7) (1928) 45 R. P. C. 199.

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SIR WILFRID GREENE M.R. This is an appeal by the proprietors of a registered trade mark from the judgment of Crossman J., who held, affirming a decision of the Assistant-Comptroller, that the mark should be expunged from the register.

The section under which that jurisdiction exists—s. 35 of the Trade Marks Act, 1905—provides that the Court may, on the application of any person aggrieved by any entry made in the register without sufficient cause, make such order for expunging or varying such entry as it may think fit. I have picked out the essential words of the section.

The case is a curious one, and has been very fully argued, and a number of points of some difficulty have been discussed. In the view which I take of the case there is an answer, and a comparatively short answer, to this appeal; but I shall have to discuss to a certain extent the other matters debated before us.

The mark in question, which consists of the word "Livron," was advertised in the Trade Marks Journal of July 6, 1932. The appellants, Boots Pure Drug Company, Ld., registered it in Class 3 in respect of "tonic medicines for human use." We do not know what was before the Registrar at the date of the application, but we must assume that there was nothing before him of any moment to the consideration of this case. It so happens that, unknown apparently to Messrs. Boots, the applicants for registration, there is in France a town of substantial size the name of which is spelt in the same way—Livron. It is a town situated just to the east of the main road from Lyons to Avignon and Marseilles, a town of some 4000 inhabitants, and it owes its appearance in this case to a rather remarkable coincidence—namely, that at the time of the application to register the mark the present respondents, who are a French company or combine engaged apparently on a considerable scale in the manufacture of medicines for human consumption, had there, as they still have, one of the factories at which they make medicines of various kinds. When they discovered the existence of the Livron mark on the register they complained, and on March 5, 1934, they launched an application under s. 35 to rectify the register by expunging that mark.

One would have thought, just looking at those bald facts, that if, when the matter came originally before the Registrar on the application for registration, it had been pointed out to him that there was this town in France where manufacturers of medicines were actually making medicines he would at once have said: "This mark is not a suitable mark for "registration and I will refuse to register it." The mere statement of that fact would appear to suggest, and to suggest with overwhelming force, that a mark of that kind is not the kind of mark which ought to be registered.

The appellants, when they adopted this mark, adopted it as a word which they had invented for the purpose of their trade, being a combination of the word "liver" and the word "iron," their intention being to use it, or at any rate that one of its uses should be, in connection with a tonic in which liver extract and iron were used and it is in connection with that tonic that they have in fact used the mark. If those facts had been before the Registrar, and he had, in spite of the existence of this factory in France at Livron, registered the mark, in my judgment he would have been wrong in so doing and the Court, if the matter had come before it, would have reversed his decision.

It is not, however, sufficient merely to state the facts and to say that the conclusion from those facts is what I have said. It is necessary to examine a little more closely the sections of the Trade Marks Act and the arguments which have been put before us. It is said first of all that the tribunal before which an application under s. 35 comes ought not to expunge a mark unless it is either one which could not have been registered having regard to the words of the Act, or is one which the Registrar, although on the language of the Act he might have had the power to register, ought not to have registered on the facts of the case. That proposition I am prepared for the purpose of this discussion to accept, and the matter therefore falls to be considered from two aspects: one, whether the Registrar had power under the Act to register the mark, the other whether he ought to have registered it on the particular facts of the case having regard to the fact that in the last resort there is always an element of discretion in allowing registration.

It is said that the registration would have been justified under some one of three paragraphs of s. 9 of the Act as amended by the Act of 1919. In considering them it is necessary to proceed on the hypothesis that the Court is putting itself back to the date of the application and is considering the matter on the footing that an application was then being made with the full facts before the Registrar. The question it then has to decide is whether, in the light of those facts, the case was one which fell within one of those three paragraphs. Then comes the further point which I have mentioned—namely, that assuming it did, is it a case where in the exercise of his discretion the Registrar ought to have refused registration ?

It is first of all said that the word is an invented word within the meaning of para. 3. I myself am unable to accept that view. The meaning of the words " invented word " has been discussed in some authorities, but apart from one case before Chitty J.—*In re Sir Titus Salt, Bart., Sons & Co.'s Application* (the *Eboline* case) (1)—we were not referred to any case where the question as to the application of this sub-section to foreign place-names has been considered. The question of what is an invented word has been considered in two cases which I can, for shortness, refer to as the *Solio* case—*Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (2)—in the House of Lords and the *Diabolo* case—*Philippart* v. *Wm. Whiteley, Ld.* (3)—before Parker J. I do not find very much assistance from either of those cases in determining the question whether the name of this town in France can be an invented word within the meaning of para. 3, but I must say a word or two about them.

In the *Solio* case (2) the word in question was the word

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(1) [1894] 3 Ch. 166.
(2) [1898] A. C. 571.
(3) [1908] 2 Ch. 274 ; 25 R. P. C. 565.

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"solio," which is not an English word, but is the Italian word for a throne, and it was argued or suggested in the course of the case that the fact that it was the Italian word for a throne prevented it from being an invented word. But the real contest in the case was whether, assuming it was an invented word, the words of para. 4, which in cases falling under that paragraph prohibit a reference to the character or quality of the goods, apply also to para. 3, it being said on behalf of the Comptroller, who was the only other party to the proceedings, that the word "sol" in "solio" suggested the sun, and that was illegitimate in the matter of photographic materials. That proposition was negatived, and it was assumed, without apparently the point being argued, that "solio" was an invented word. I am myself unable to find any assistance in that case in the application of the paragraph to the name of a place, to which it seems to me different considerations apply.

In the *Diabolo* case (1) Parker J. stated two considerations which are essential before a word can be an invented word—one, that the word must be newly coined, and the other, in substance, that, besides being a newly coined word, it must also be a word which has no obvious meaning to the ordinary educated Englishman. In the case of "solio," for instance, that would be a newly coined word within Parker J.'s definition, which refers to words current in the English language. The word "solio" was not current in the English language at all. But the next question would be whether, although not a word current in the English language, it was a word which would convey an obvious meaning, as might well happen if the word was by some sort of a jingle, or the presence of some element in it, one which suggested an obvious meaning to the English hearer.

Those considerations apply to what I may call foreign dictionary words, that is, words with a meaning in a foreign language, and their application does not appear to present much difficulty. But are they applicable to the case of a foreign place-name? The first thing to notice is that a foreign

(1) [1908] 2 Ch. 274.

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place-name has an existence, not merely for foreigners but for Englishmen, because if any Englishman wishes to refer to that place that name is the only name which he can use. Take the case of Livron. I cannot bring myself to see that the word " Livron " can be an invented word in view of these facts, first, that it is the name and the only name of an existing place, and, secondly, that no Englishman could ever use any other name if he wished to refer to that place. How can a person be said to have invented a word of that kind ? It is not at all like " solio," because an Englishman wishing to refer to a throne uses the word throne ; he does not use the word " solio." An Englishman wishing to refer to Livron can only refer to Livron and to nothing else. It appears to me that it is impossible therefore to say that Livron is an invented word ; but if it be thought that that is putting the matter too high, I still think that in the circumstances of this case, having regard to the industry carried on at Livron, it is quite impossible in this context to say that the word is an invented word.

The next paragraph with which I must deal is para. 4, and that gives as one of the essential particulars of a trade mark : " A word or words having no direct reference to the character "or quality of the goods, and not being according to its ordinary "signification a geographical name or a surname." The important words there are " not being according to its ordinary "signification a geographical name or a surname." We approach this paragraph on the hypothesis that the word is not an invented word, and for the reason that it is a word existing and having a definite meaning and a definite reference to one particular thing—namely, the place Livron. Approaching para. 4 on that basis, I do not see how it can be said that the word is according to its ordinary signification anything but a geographical name. If it is something else, what is it ? It is ex hypothesi nothing, because you cannot for this purpose bring into consideration the meaning which it has acquired, or may have acquired, by its use in connection with Messrs. Boots' product. The matter must be looked at at the time when application for registration was made. What, at that time, would the word "Livron" have meant in the mouth of any Englishman who was using that word in an intelligible sentence, and not merely talking gibberish? It would mean one thing, it seems to me, and one only—namely, the place. If it is assumed that an Englishman uses that word, he must use it with reference to the place or else be talking something which was unintelligible and gibberish.

That being so, it seems to me impossible to say that the word in the mouth of an ordinary Englishman, or the word to the ear of a person who understood what the speaker was saying, could have any signification other than a geographical one. It is worth remembering that para. 4 in its present form was modified some time after the *Magnolia* decision—*In re Magnolia Metal Co.'s Trade Marks.* (1) Before that decision the Act of 1888 contained an express prohibition of geographical names. The Act of 1905 qualified that by adding the words "according to its ordinary signification." The *Magnolia* case (1) had construed the original words very much in the sense of the section as it now stands, but however that may be, the Legislature has now, putting it beyond all possibility of doubt, provided for a case where a word has more than one signification, one of them being geographical and the other not, and it is possible to predicate of that word that according to its ordinary signification it is not a geographical name. There could not be a better and fairer example of that than the *Magnolia* case (1) itself. But Mr. Swan argued that under para. 4 it is possible to have a name which, although it is a geographical name, has no ordinary signification at all, and therefore has not ordinarily got a geographical signification. I am afraid that I am not able to follow that argument, because it seems to me that, when once it is found that a word fails to be an invented word because it is a geographical name, it is impossible to say that that is a word which has no signification, the reason being, as I see it, that whenever that word is used with the intention to convey any meaning by it it will be used for the purpose of conveying a geographical meaning and none other. In my opinion, para. 4 does not cover this case.

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(1) [1897] 2 Ch. 371.

It is then said that the case falls under para. 5, which states: "Any other distinctive mark, but a name, signature, or word "or words, other than such as fall within the description in the "above paragraphs (1.), (2.), (3.) and (4.) shall not be registrable "under the provisions of this paragraph, except upon evidence "of its distinctiveness." "Distinctive" is defined as meaning "adapted to distinguish the goods of the proprietor of the "trade mark from those of other persons." It is to be observed that the paragraph only comes to be considered on the hypothesis that the word "Livron" is a word or a name, and accordingly under the requirements of the paragraph it is not to be registrable except on evidence of its distinctiveness.

It is said that if all the evidence which we now have before us had been before the Registrar at the time of the application the Registrar could properly have registered the mark on the footing that he was satisfied that it was a distinctive mark. In my opinion that is not so. It seems to me that if the Registrar had had all the matter before him which is before this Court he would have been wrong if he had granted registration of this mark, because the mark being ex hypothesi the name of a place, and the name of a place where medicines of a similar character are manufactured, and it appearing that the business in medicines is of an international character, I cannot see myself how the Registrar could, with any propriety, have held that the mark was distinctive. It therefore appears to me that, even conceding to Mr. Swan several propositions which Mr. Burrell hotly contested, he would fail on the ground which I have stated. But Mr. Burrell said that some of the assumptions which I have made in Mr. Swan's favour ought not to be made. He contended that the mark was inherently incapable of registration because at the time no evidence of its distinctiveness in fact was produced, and that in dealing with a name, signature or word there must be evidence of that character produced before the Registrar has any jurisdiction to grant registration. That is a matter which opens up some questions which are not too easy to decide, and on the facts of this case it appears to me to be unnecessary to go into them. But in making the assumption in Mr. Swan's favour that the mark could have been registered without the production of evidence that it had in use become distinctive, it must not be assumed that I consider that the proposition is one which has been established. I decide the matter so far as this paragraph is concerned on the ground that, even assuming that the Registrar had power to register the mark, he would have been wrong if he had treated its distinctiveness as proved.

That, I think, covers all the paragraphs, but I must refer to another aspect of the argument. It is said that, even if the matter comes within one or other of those three paragraphs, nevertheless the Registrar on the original application would have had a discretion. In other words, that it is not enough for a word to be an invented word or a word under para. 4 because even if it is the Registrar nevertheless is entitled under the exercise of his discretion to say that on the particular facts of the case the mark is one which ought not to be registered. And it is said that on the facts of this case, even if the word were an invented word, or was not in its ordinary signification a geographical name, the Registrar ought not to have registered. I myself take that view, and I think that even if I am wrong in holding that this is not an invented word, and that its ordinary signification is geographical, nevertheless on the particular facts of the case, if the Registrar had registered it, he would have been exercising his discretion in a way which this Court would have overruled if the matter had come before it. I say that, of course, in relation to the particular facts which are now known.

I have not said anything so far about another matter—namely, s. 11, which provides: "It shall not be lawful to "register as a trade mark or part of a trade mark any matter the "use of which would by reason of its being calculated to deceive "or otherwise be disentitled to protection in a Court of Justice." It is not very clear what view was taken by the Assistant-Comptroller or the learned judge as to the applicability of that section. It is to be remembered that it is one which exists not merely for the benefit of other traders but for the benefit of the public at large, and I take the view that this is a case where the Registrar—who in the first instance would have to decide the issue of fact under that section—if he had had all the facts before him which we now have before us, ought to have held that the use of the mark would have been calculated to deceive. It appears to me to be quite insufficient to displace that proposition to say that in practice the use of the mark has not deceived. The use of the mark has been limited in the past to its use in a particular way and in a particular context. But since under the registration the mark can be used as a registered mark in connection with anything falling within the class (and it can be used with or without other words on the cartons or bottles), the question is whether the use of the mark in any way in which it can be used as a mark would be calculated to deceive. It appears to me that the use of the mark ought to be held to be calculated to deceive having regard to the existence in a place of the same name of a company carrying on the same business and manufacturing articles of the same class.

I have endeavoured to deal with all the points which have been put before us. In my opinion the Assistant-Comptroller and the learned judge were right in the view which they took in this case and the appeal must be dismissed.

I should add one further matter. A suggestion was made that the Court might exercise its power under s. 35 and, instead of ordering the removal of the mark from the register, order a variation of it. It was suggested that a variation under which the words " trade mark " and " brand " were added would be sufficient. In my opinion the addition of those words would not be sufficient on the facts of this case to prevent the possibility of confusion and deception taking place ; nor would they have the effect of getting rid of the objections to the mark which I have endeavoured to specify, and that application therefore cannot succeed.

ROMER L.J. I agree that this appeal must be dismissed on the ground that, even assuming that the word " Livron " comes within paras. 3, 4 or 5 of s. 9 of the Trade Marks Act, 1905, registration ought to have been refused either because under s. 11 the mark would be calculated to deceive in the circumstances to which the Master of the Rolls has referred, or because if, with full knowledge of the facts as now known to us the Registrar in the exercise of his discretion had allowed the registration to take effect, he would have been plainly wrong and would, had an appeal been brought from his decision in the light of those facts, have been overruled by the Court. In those circumstances it is not strictly necessary for me to deal with the many arguments which have been laid before us on one side or the other as to the true meaning and effect of the paragraphs of s. 9 to which I have referred; but in deference to those arguments, and as I regret that I do not see altogether eye to eye with the Master of the Rolls in the view which he has taken of those paragraphs, I would like to add a few words myself.

Dealing with the words in para. 3: " An invented word or "invented words," I confess that I should regret very much to come to the conclusion that a word wholly unknown to an ordinary Englishman was not an invented word merely because on investigation in some gazetteer or atlas or anything of that kind it was found that there existed in a foreign country a place or a person whose name was identical with or substantially identical with the word proposed to be registered. No one except Parker J. has ever attempted to define the meaning of those words used in that paragraph. He did so in the case to which the Master of the Rolls has referred, which is usually mentioned as the *Diabolo* case. (1) Parker J., who knew more about trade mark law than most people, said this (2): " To be an invented "word, within the meaning of the Act, a word must not only be "newly coined in the sense of not being already current in the "English language, but must be such as not to convey any "meaning, or at any rate any obvious meaning, to ordinary "Englishmen." It will be observed that his language is quite general. He said that the word must be newly coined in the sense of not being already current in the English language, and I cannot help thinking that a word which happens to be the name of some foreign place or resident, and which is not in use in this country as an ordinary English word, comes within that definition. It is true that the word has to satisfy another test. It has not only to be not current in

(1) [1908] 2 Ch. 274. (2) Ibid. 279.

the English language, but it must be a word which will not convey any meaning, or at any rate any obvious meaning, to the ordinary Englishman. There are a great number of foreign names which do and will convey an obvious meaning to an Englishman, but the words of which I am thinking are words which have never been known, never been heard of, by except perhaps a quite negligible minority of English people, and which to the ordinary Englishman would not convey any meaning, and still less any obvious meaning. I do not by those observations intend to suggest for one moment that for that reason "Livron" is an invented word. It is true, in the sense which I have given to it, and which, I think, Parker J. intended to give to the phrase, that the word is not current in the English language; but it is a place of 4000 inhabitants situated in a neighbouring country which is visited every year by thousands of our fellow countrymen, and I should think it is more than likely that the word "Livron," especially having regard to the fact that this factory is there, and has, I understand, been there since somewhere near the year 1928, may convey an obvious meaning to the ordinary Englishman.

The next point on which I wish to make one or two observations is whether, assuming it not to be an invented word, it can be said to be a word not being according to its ordinary signification a geographical name or surname within the meaning of para. 4, because plainly it has no direct reference to the character or quality of the goods. The question which arises on that paragraph seems to me to be this. So far as the arguments in the present case have been addressed to it, can it be said of a word which has no signification whatsoever to the ordinary Englishman that it is according to its ordinary signification a geographical name? I confess that I myself can give only one answer to that question. If it has no signification to the ordinary Englishman it certainly cannot have a geographical signification.

It is said that to adopt such a construction as that would embark the Registrar or the Court on a very difficult inquiry whether the name of a certain place does or does not ordinarily bear a geographical signification to the ordinary Englishman, but the Court has to deal with such difficult inquiries under this Act. Whatever construction is placed on this paragraph, a difficult inquiry at once becomes apparent when the matter is brought to the attention of the Court. Supposing that a word which is the name of a place and is also the name of a thing is current in the English language, the Court still has to consider whether its ordinary signification is geographical or not. That task is no less difficult when the Court has to consider whether a word ordinarily bears a geographical signification, there being no similar word in the English language. The truth of the matter is that the Court in any case has to conduct inquiries of a very difficult nature. But it must be remembered, as has been pointed out so often, that when a case is on the border-line the Registrar has—as he has in every case—a discretion, and in cases on the border-line the Registrar will usually refuse to exercise his discretion in favour of registration.

On para. 5 I do not think I have anything to add to what has been said by the Master of the Rolls. If a case does not fall within para. 3 or para. 4, then plainly a word like " Livron," prima facie, is not adapted to distinguish, because it will fail to be an invented word by reason of the fact that it will bear an obvious meaning to the ordinary Englishman. For the reason why it fails to be an invented word or to be a word not bearing an ordinary geographical signification is that it will ordinarily bear such a signification to an Englishman ; therefore when one comes to para. 5 one starts with the fact that, prima facie, the word is not adapted to distinguish ; but, nevertheless, I agree with Mr. Swan that the evidence to show that nevertheless it is adapted to distinguish need not consist of evidence as to actual user. I think that evidence that the word, not at large, but in connection with the particular goods to which it is sought to apply it as a trade mark, is adapted to distinguish will be sufficient. In the present case, it is quite plain, I think, that the appellants have failed to produce any such evidence. The word being, prima facie, for the reasons which I have mentioned, inherently incapable of distinguishing the goods becomes still less capable of distinguishing the goods when it is pointed out that it is intended to use the word in connection with medicines, and that at a place in France called Livron medicines of that kind or of a not very dissimilar kind are manufactured.

I agree that this appeal fails and that registration ought not to be allowed.

MacKinnon L.J. I agree that this appeal fails and I can state very shortly the way in which the case strikes me. " Livron " is not and cannot be an invented word within para. 3 of s. 9 for the reason that it is an existing word, a word with a known or ascertainable meaning, since it is the name of a town in France. I think that the *Eboline* case (1) rightly decided that a foreign place-name cannot be an invented word within the meaning of para. 3 of s. 9. That, of course, would be subject to the rule de minimis. If a trader so far as his knowledge went, invented a new word, and if it were subsequently shown that his invented word was in fact the name of a field in a rural parish, or the name of an unclimbable peak in the Himalayas, I do not think either fact would impair the validity of his claim that the word was an invented word. But any such consideration as that does not apply to this case, because Livron is a fair-sized town in France with factories in it. If Livron is not admissible under para. 3 as an invented name, because it is the name of a foreign place, I think it follows that it is not admissible under para. 4, seeing that in its only signification it is a geographical name, and its only signification must be its ordinary signification. It is true that in the *Magnolia* case (2) a place-name was not the only signification of that word, and there was therefore room for inquiry whether the place-name was its ordinary signification. I suppose it is probable that it was because of the existence of the *Magnolia* case (2) that the words " according to its ordinary signification " were added to the words " geographical name " in the Act of 1905. In this case, unlike the *Magnolia* case (2), the place-name is the only signification of the word, therefore the view that the word is geographical in its ordinary signification seems to me

(1) [1894] 3 Ch. 166.
(2) [1897] 2 Ch. 371.

unavoidable. The words "in its ordinary signification" suggest a choice between that meaning which is usual and that which is unusual, or less usual, and if there is but one meaning no such choice can arise. The argument that the ordinary signification of the word is not "geographical" because English people generally did not know of it, is in truth an argument logically addressed to the proposition that the word is meaningless in England, and therefore is an invented word and allowable under para. 3. But as I have said, I think that because it is in truth a foreign place-name it cannot be an invented word, and as its only signification as a real word is a geographical one, it necessarily becomes inadmissible under para. 4.

The remaining paragraph under which some attempt was made to justify this mark is para. 5. I think it is sufficient with regard to that to say that there is no evidence that this mark is distinctive of the appellants' goods except in so far as that may be said to be evident from the word itself. But if the word is distinctive of any class of goods, it seems to me that it can clearly be only distinctive of the chemical products of the respondent company, though the use of the name as a trade mark would be equally barred to them by reason of the fact that it is a geographical name.

I agree that the appeal fails.

Appeal dismissed.
Leave to appeal was refused.

Solicitors: *Seaton Taylor & Co.*; *G. B. & L. Ellis*; *Solicitor to Board of Trade.*

H. C. G.

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July 21, 22.

ATTORNEY-GENERAL *v.* LIVERPOOL CORPORATION.

[1937. A. 553.]

Electricity—Railway Electrification—Right of authorized undertaker to supply current—Original railway undertaking outside proposed area of supply—Amalgamation—Undertaking absorbed by amalgamated company—Railway partly within and partly without area of supply—" May supply and are supplying within their . . . . area of supply " electricity for haulage or traction "—Consent of Minister of Transport—Supply for general purposes partly used for haulage—Railways Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 55)*—Electricity* (*Supply*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 51), *s.* 47.

The Corporations of Birkenhead and Liverpool were each authorized undertakers for the supply of electricity within their respective areas of supply. The L. M. & S. Ry. Co., an amalgamated company within the Railways Act, 1921, desired to obtain a supply of electricity for working the Wirral Railway, which was absorbed by the L. M. & S. Ry. Co. and was a detached portion of their system lying partly within the Birkenhead, but wholly without the Liverpool, area of supply. They obtained tenders from Liverpool and Birkenhead, and the Liverpool tender being the lower, they accepted it subject to the consent of the Minister of Transport, which was given after the holding of a local inquiry. It was proposed to give a supply at a point in Liverpool belonging to the L. M. & S. Ry. Co., and to convey it to the Wirral Railway through the Mersey Railway tunnel under a wayleave agreement.

The plaintiff brought this action at the relation of the Birkenhead Corporation against the Liverpool Corporation and the L. M. & S. Ry. Co., claiming that the defendant Corporation had no power to give or the railway company to take such a supply :—

Held : (1.) that the Wirral Railway was not for the purpose of the powers of electrification a separate undertaking but part of the undertaking of the L. M. & S. Ry. Co., which were the owners of a railway partly within and partly without the area of supply of the Liverpool Corporation ;

(2.) that the L. M. & S. Ry. Co. was not restricted in regard to obtaining a supply of electricity for electrification of the Wirral Railway to the powers conferred by the Wirral Railway Act, 1900, s. 6, which was an enabling section and did not prevent s. 47 of the Electricity (Supply) Act, 1926, from conferring the requisite power ;

(3.) that the words " may supply " in s. 47 did not refer exclusively to the power to supply electricity conferred by s. 5 of the Electric Lighting Act, 1909 ;

(4.) that by supplying electricity within their area of supply to the L. M. & S. Ry. Co. for general purposes, the Liverpool Corporation were, as part of that supply was being used for the operation of capstans and traversers, "supplying within their area "or district of supply electricity for haulage or traction" within s. 47;

(5.) that the words "so supply electricity" in s. 47 meant supply electricity within their district or area of supply.

Held, therefore, that s. 47 enabled the Liverpool Corporation within their area of supply to supply, and the L. M. & S. Ry. Co. to take, electricity for the electrification of the Wirral Railway.

Decision of Simonds J. ([1937] Ch. 450) affirmed.

APPEAL from Simonds J. (1)

The Attorney-General at the relation of the Corporation of Birkenhead brought this action against the Corporation of Liverpool and the London Midland & Scottish Railway Company, and moved therein for an order that the defendant Corporation be restrained until trial or further order from supplying or entering into any agreement to supply to the defendant railway company electricity for use by the defendant company on or in connection with the Wirral Railway, owned by that company, and for an order that the defendant company be restrained from receiving or purchasing or entering into any agreement to receive or purchase from the defendant Corporation a supply of electricity for use on or in connection with the Wirral Railway and from using on the said railway electricity supplied by the defendant Corporation.

The motion, by agreement, was treated as the trial of the action, and the following is an agreed statement of facts :—

"The Birkenhead Corporation and the Liverpool Corporation "are each of them authorized undertakers for the supply of "electricity within their respective areas of supply under the "Electricity (Supply) Acts, 1882–1936.

"Pursuant to the Electricity (Supply) Act, 1926, each of the "said Corporations is taking a supply of electricity from the "Central Electricity Board for the purposes of their respective "undertakings.

"The defendants, the London Midland & Scottish Railway "Company (hereinafter referred to as 'the company'), who "are an amalgamated railway company within the meaning of

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"the Railways Act, 1921, and were incorporated by the North "Western, Midland & West Scottish Group Amalgamation "Scheme, 1923 (S. R. & O. 1923, No. 827), are the owners of a "railway undertaking situate partly within and partly without "the area of supply for electricity purposes of the Liverpool "Corporation.

"By virtue of the London Midland & Scottish Absorption "(No. 1) Scheme, 1923 (S. R. & O. 1923, No. 1180), the company "are the owners of the undertaking which prior to the said "absorption scheme was the undertaking of the Wirral Railway "Company and which by the said scheme was transferred to and "vested in the company.

"The Wirral Railway passes through the areas of supply of "the Birkenhead Corporation, the Wallasey Corporation, and "the Hoylake Urban District Council respectively, but no part "thereof passes through or is situate within the area of supply "of the Liverpool Corporation.

"The Wirral Railway is physically connected at West Kirby "with a railway known as the Birkenhead Railway, which was "constructed under the Chester and Birkenhead Railway Act, "1837, and subsequent Acts, and which by virtue of the "Birkenhead (Vesting) Act, 1861, became vested in the London "& North Western Railway Company and the Great Western "Railway Company jointly. The Wirral Railway has no "other through rail connection with the other railways of the "company.

"The defendant railway company have adapted to electric "traction part of the Wirral Railway and, being desirous "for the purpose of working the same to obtain a "supply of electricity of the character and description "set out in the First Schedule hereto, to be used on "or in connection with the Wirral Railway for any purposes of the company's undertaking, invited and received "tenders for such supply from the Liverpool Corporation and "the Birkenhead Corporation, each of whom were ready and "willing to provide the required supply. The said tenders "were at prices calculated as provided by s. 12 of the Electricity "(Supply) Act, 1926.

"The company was desirous of taking the supply from the "Liverpool Corporation because their tender was materially "lower than the tender of the Birkenhead Corporation, and with "that object the company and the Liverpool Corporation by "letters dated June 5 and July 15, 1936, jointly made application to the Minister of Transport pursuant to s. 47 of the "Electricity (Supply) Act, 1926, for his consent to the said "supply being given by the Liverpool Corporation.

"An inquiry having been duly held, that consent was given.

"It is the intention of the defendants that the said supply "shall be given by the Liverpool Corporation and shall be "taken by the company in the following manner :—

"(*a*) The supply will be transmitted by the Liverpool "Corporation along their own cables to the point marked A "on the map annexed hereto being a point within their area of "supply and will be delivered at the said point A to the "company.

"(*b*) From the point of delivery at the said point A the "company will transmit the supply along their own cables to "the point marked B on the said map, being a point on the "Wirral Railway upon which the supply is to be used. The "said cables will be carried from the said point A over the "property and through a tunnel belonging to the Mersey "Railway Company under a wayleave agreement with that "company.

"The company will pay to the Mersey Railway Company an "annual wayleave charge of 50*l.* in respect of the passage of "the cables through the said tunnel.

"(*c*) The delivery by the Liverpool Corporation of the said "supply at the said point A will be effected in the following "manner :—

"At the said point A the company will lease from the "Mersey Railway Company a site on the James Street Railway "Station premises of that company and upon that site the "company will construct a station or building in which will "be installed a switchboard with all such switchgear, meters "and fuses as may be necessary or convenient for enabling the "Liverpool Corporation to deliver and the company to take "delivery of the supply at the said switchboard and for enabling "the company to control the user and further transmission of "the supply from the point of delivery and for measuring the "supply delivered.

"The said site and the said station or building will "be used solely for the above purposes and for no others "and together with the switchgear will be under the control "of the company, but subject to access by the Liverpool "Corporation.

"(*d*) The supply will be given by the Liverpool Corporation "at a pressure of 11,000 volts and, save in so far as it may be "transformed to a lower voltage and used for the lighting "and heating of the said station or building it will remain at "that voltage until it reaches the said point B and will not "be used within the area of supply of the Liverpool Corporation.

"(*e*) If it appears convenient to the company so to do they "will instal in the said station or building a transformer and "will transform a portion of the supply to a lower voltage and "will use the same for the lighting and heating of the said station "or building; but even if this is done such user will be very small "in comparison with the user outside the area of supply of the "Liverpool Corporation for the operation of the Wirral Railway.

"The company will use the said supply for the lighting or "heating aforesaid if it be held that such user is necessary in "order to comply with the requirements of the Electricity "(Supply) Act, 1926.

"The Liverpool Corporation supplies and has at all material "times supplied the company at various points within the said "Corporation's area of supply with electricity, some part of "which is used for the purpose of operating certain capstans, "wagon hoists and traversers or travelling cranes. Particulars "of the said capstans, wagon hoists and traversers or travelling "cranes and of the points are set out in the Third Schedule "to the statement. In each case the electricity so used is part "of a supply which is provided by the Liverpool Corporation "and used by the company for other purposes in addition to "those specified above.

"Through trains are run by the company between London

"(Euston) and New Brighton via Hooton, Parkgate and West "Kirby over the Wirral Railway."

Simonds J. said that the defendants relied on s. 47 of the Electricity (Supply) Act, 1926, for both the power of the Liverpool Corporation to supply and of the London Midland & Scottish Railway Company to take electricity for the purpose of electrifying the Wirral Railway. For the plaintiff it was argued that for the purpose of the section the London Midland & Scottish Railway Company were not owners so far as regards the Wirral Railway of an undertaking partly within and partly without the area of supply of the Liverpool Corporation, and that the London Midland & Scottish Railway Company had since the absorption of the Wirral Railway only the same power of taking electricity that the Wirral Railway had under s. 6 of the Wirral Railway Act, 1900 (63 & 64 Vict. c. xci.). He could not accept this contention. It seemed to him that as soon as the absorption scheme came into operation a reference to the company in any general legislation must be taken to mean the London Midland & Scottish Railway Company. Further, s. 6 of the 1900 Act was an enabling section, and by s. 47 of the Act of 1926 a wider power was conferred on a railway company. Next, could it be predicated of the Liverpool Corporation that they " may supply and are "supplying within their district or area of supply electricity "for haulage or traction" to the company? He could not accept the view that " may supply " referred back exclusively to s. 5 of the Electric Lighting Act, 1909. It was clear from s. 175 of the Liverpool Corporation Act, 1921 (11 & 12 Geo. 5, c. lxxiv.), that the Liverpool Corporation had the power to supply required by s. 47. Further, the Liverpool Corporation were supplying electricity for haulage or traction within their area of supply. It was sufficient that there was a supply for general purposes part of which was used for haulage or traction. It followed that s. 47 of the Act of 1926 applied and the action failed.

The plaintiff appealed. The appeal was heard on July 21 and 22, 1937.

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Hon. Sir Stafford Cripps K.C. and *Anthony Ward* for the appellants.

Tyldesley Jones K.C., *Alfred Tylor* and *Roger Pezzani* for the respondents.

The arguments were substantially the same as before Simonds J., but the following additional authorities were referred to: *In re Smith's Estate* (1); *Yool* v. *Great Western Ry. Co.* (2); *Rex* v. *Minister of Health.* (3)

SIR WILFRID GREENE M.R. This is an appeal by the plaintiff from a judgment of Simonds J. delivered on the hearing of a motion which, by agreement between the parties, was treated as the trial of the action. As the result of that judgment the action stands dismissed.

The plaintiff is the Attorney-General, at the relation of the Corporation of Birkenhead, and he seeks to restrain the London Midland & Scottish Railway Company from taking and the Corporation of Liverpool from giving a certain supply of electricity for the purposes which I shall indicate in a moment.

The London Midland & Scottish Railway is one of the amalgamated railways constituted under the Railways Act, 1921. So far as their actual physical possessions in the neighbourhood in question are concerned, they may be shortly stated as follows: They have a series of lines physically situated within the electricity supply area of the Liverpool Corporation. Those lines extend outside the area and reach to London on the one hand, and other parts of the country on the other, by a continuous series of lines. They are also the owners of a railway situated in the Wirral Peninsula, on the other side of the Mersey, which is not physically connected with any line belonging to the London Midland & Scottish Railway. It has a physical connection with two other railways, one being the Birkenhead Railway. That is a joint line, belonging to the London & North Western Railway and the Great Western Railway, which has a junction with the Wirral Railway; but for the purposes of this case that joint line is of no importance. The other line is the Mersey Railway, which runs from Liverpool to Birkenhead by a tunnel under the Mersey. I am not, however, sure that it has a physical connection of the rails with the Wirral Railway, but if not, there is contiguity in the matter of terminal stations in Birkenhead.

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(1) (1887) 35 Ch. D. 589.

(2) (1870) 22 L. T. 781.

(3) [1936] 2 K. B. 29, 44.

The London Midland & Scottish Railway Company are minded to electrify a portion of the Wirral Railway, and the portion which they propose to electrify lies in part within the electricity supply area of the Corporation of Birkenhead, in part in the Wallasey supply area, and in part in the Hoylake supply area. To obtain the electricity necessary for that railway they propose to take from the Liverpool Corporation a supply at terminals in Liverpool within the area of supply of that Corporation. The terminals will be situated on a building which will be erected by the London Midland & Scottish Railway Company on a piece of land which is going to be taken for the purpose from the Mersey Railway Company. The cables will then be led from the London Midland & Scottish Company's switchboard at their terminals through the Mersey Railway Company's tunnel under the Mersey, and so will be brought to the Wirral Railway, the passage of the cable through the tunnel being provided for by a wayleave agreement between the London Midland & Scottish Railway Company and the Mersey Railway Company.

A proposal for the giving and taking of this supply was brought before the Minister of Transport for his consent, which was necessary on the assumption that s. 47 of the Electricity (Supply) Act, 1926, applies to the case, and such consent was given. The relators in the present action took the view that the Minister had no power under that section to give consent, and accordingly they instituted these proceedings with a view to restraining the Liverpool Corporation and the London Midland & Scottish Railway Company from giving effect to the arrangement. Stating it quite shortly, the ground of that contention was and is that, under s. 47, the Liverpool Corporation have no power on the facts of the

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case to give a supply to be used in connection with the Wirral Railway, which lies right outside their own area. Simonds J. held that the action was not well founded, and accordingly he dismissed the action, and this appeal is an appeal from his decision.

In my opinion, the decision of the learned judge was perfectly right. If in the course of this judgment I do not appear to do full justice to all the arguments in their various aspects which have been put before us by Sir Stafford Cripps and Mr. Ward on behalf of the appellants, it must not be taken that I have not understood them or not carefully weighed them.

The question really turns upon s. 47, but before I come to consider that section I must refer to some other statutory provisions which require to be understood before the points raised can be followed. Under the Railways Act, 1921, two schemes were made having statutory force, the first being the scheme under which the London Midland & Scottish Railway Company was formed, the second being the scheme under which the Wirral Railway was absorbed—namely, the London Midland & Scottish Absorption (No. 1) Scheme, 1923 (S. R. & O. 1923, No. 1180). Para. 5 of the scheme provides that " the undertakings of the vested companies "—that phrase includes the Wirral Company—" are hereby "transferred to and absorbed by and shall form part of the "undertaking of the company "—that is, the London Midland & Scottish Company—" and each such transfer and absorption "shall take effect as on and from the date of vesting." Para. 6 provides : " On and from the date of settlement the vested "companies shall be and are hereby dissolved except for the "purpose of anything to be done in accordance with this "scheme." Para. 3 of the Order incorporates Part V. of the Railway Clauses Act, 1863, subject to the provisions of the Act.

The effect of the Order, in the ordinary understanding of the English language, appears to be to merge into the single undertaking of the London Midland & Scottish Railway Company the undertaking of the Wirral Company. And when the Legislature passed the Electricity (Supply) Act, 1926, it must have had in mind the position of these amalgamated railway companies in relation to companies which they had absorbed, and the language which had been used in relation to the undertakings of these amalgamated companies under the Act of 1921.

So much for the manner in which the Wirral Company became part, as the Order says, of the undertaking of the London Midland & Scottish Railway Company. But the Wirral Company when it became so absorbed was a company which under the statutes affecting it had certain powers and, in particular, powers in relation to electrification. The relevant Act under which the electrification powers of the Wirral Railway had been obtained was the Wirral Railway Act, 1900, to one or two provisions of which I must now refer. The importance of them in the argument will appear later. The Act recites, among other matters: "And whereas "it is expedient that the company be empowered to enter into "and carry into effect agreements with other companies "public bodies and persons and with the Mersey Railway "Company as hereinafter mentioned." Effect is given to that recital by, among other sections, s. 6. Sect. 4 gives power to the Wirral Railway Company to work its railway by electrical or other motive power. By s. 5 power is given to erect stations, engines and machinery, and s. 6 provides as follows: "The company may enter into and carry into "effect agreements with any other company body or persons "authorized to supply electricity in any district in which any "part of the railways and works of the company are situate "for the supply to the company by such other company body "or persons of electricity or electrical power for the working "of the railway and works of the company or any part thereof." That is one of the sections which the recital says it is expedient should be passed to empower the company to enter into and carry into effect agreements; and it is, on the face of it, an enabling section and nothing more.

So much for the position on the side of the London Midland & Scottish Railway Company and the Wirral Company. On the other side, that is to say, the side of the Liverpool

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Corporation, their power to supply electricity is at present derived from the joint effect of ss. 175 and 176 of the Liverpool Corporation Act, 1921. By those sections the Corporation have the powers conferred by paragraph 10 of the Schedule to the Electric Lighting (Clauses) Act, 1899, empowering the undertakers to "supply energy within the area of supply for all public "and private purposes as defined" by the Electric Lighting Act, 1882. That Act, by s. 3, sub-s. 4, defines "private purposes" as including "any purposes whatever to which electricity may "for the time being be applicable, not being public purposes, "except the transmission of any telegram." The power therefore of the Liverpool Corporation extended to the supply of electricity to any person and for any purpose within their area.

Bearing those statutory provisions in mind, I now come to the consideration of s. 47 of the Electricity (Supply) Act, 1926, which provides: "Where any authorized undertakers "may supply and are supplying within their district or area "of supply electricity for haulage or traction to any company "or authority being the owners or lessees of a railway, "dock, harbour or canal undertaking situate partly within "and partly without that district or area, such authorized "undertakers may, subject to the consent of the Minister of "Transport and to such limitations and conditions (if any) "as he may prescribe either generally or in any particular "case, so supply electricity to be used for any purposes "of such undertaking, whether within or without such "district or area of supply, and such company or authority "may, subject to the consent of the Minister of Transport and "to such limitations and conditions (if any) as he may prescribe "either generally or in any particular case, use the electricity "so supplied for any purposes of their undertaking for which "they are entitled to use electricity." There follows a proviso which I need not read. Applying that section in its natural sense to the facts, it appears to me beyond possibility of argument that its language, so read, covers this case. The section deals first with the necessary state of facts before it is going to come into operation. There must be an authorized undertaker. The Liverpool Corporation are an authorized undertaker. Secondly, that authorized undertaker must have power to supply; the words are: "may supply . . . . "within their district or area of supply electricity for haulage "or traction." The Liverpool Corporation have such power. The supply must be "electricity for haulage or traction to "any company or authority being the owners or lessees of a "railway, dock, harbour or canal undertaking." The London Midland & Scottish Railway Company are the owners of a railway undertaking which, in my judgment, is the undertaking constituted under the Act of 1921 and the Orders passed under it. The undertaking must be "situate partly within and "partly without that district or area." The undertaking of the London Midland & Scottish Railway Company is situate partly within and partly without the district or area of the Liverpool Corporation.

The last requisite is that the undertakers must not only have power to supply, but must in fact be supplying the company indicated for haulage or traction. In point of fact, the Liverpool Corporation at the relevant date were supplying to the London Midland & Scottish Railway Company electricity which was being used for the purpose of running certain capstans, travelling cranes and travelling conveyors on parts of their track in the Liverpool Corporation supply area. That those purposes are haulage or traction purposes cannot, I think, be disputed, nor was the contrary seriously argued. Subject to the points which I shall mention in a moment when I come to deal with the argument of the relators, the undertakers, that is, the Liverpool Corporation, were at the relevant date supplying electricity for, among other things haulage or traction, for use on those capstans and conveyors.

The section then proceeds to give power to the authorized undertaker with the consent of the Minister of Transport, to "so supply electricity to be used for any purposes of such "undertaking." Reading those words in their ordinary sense and context, I should have thought the words "so supply" meant supply within their district, and that the words "to "be used for any purposes of such undertaking" meant what they say—namely, any purposes whether haulage or traction or any other purpose. But, as will appear later, it is said that that is not the meaning which must be put on those words. The supply may be for the purposes mentioned within or without the district or area of supply. Then comes the corresponding power to the railway company, or the other companies mentioned in the section, as the case may be, with the consent of the Minister, to " use the electricity so "supplied for any purposes of their undertaking." The running of the Wirral Railway by electricity is a purpose, I should have thought, of the undertaking of the London Midland & Scottish Railway Company of which it forms part.

Nevertheless, it is said that the section must be read subject to a number of qualifications, with which I will now proceed to deal as fully as I can. It is said that the authorized undertakers—namely, the Liverpool Corporation—do not come within the language of the section for certain reasons. The first is that the Liverpool Corporation are not, it is said, a corporation which may supply electricity for the purposes indicated, and the reason given is that the power of the Liverpool Corporation to supply for haulage or traction to a railway company, part of whose undertaking lies within and part without the area of the Liverpool Corporation, can only be derived under s. 5 of the Electric Lighting Act, 1909. It is further said that, as under that section the power to supply does not exist until the consent of the Board of Trade has been given, and no such consent has been given, the Liverpool Corporation are not authorized undertakers with the necessary power to supply electricity for haulage or traction. In my opinion, that argument is ill-founded. When s. 5, sub-s. 1, of the Act of 1909 is examined it will be found that it authorizes " any local authority, company or person " having authority to supply electricity in an area, " with the consent of the "Board of Trade " to " supply at any point within that area "electricity for the purposes of haulage or traction on any "railway, tramway, or canal situate partly within and partly "without that area, and for the purposes of lighting vehicles "and vessels used on any such railway, tramway, or canal." It is said that, on the true construction of that section, when once it appears that a railway, or a tramway, or a canal is physically situated partly within and partly without an area, the mere fact that it is so situated, deprives the local authority in each of those two areas of the power, "without first obtaining the consent of the Board of Trade," to supply electricity for the purposes of haulage or traction, notwithstanding that the electricity is to be so used entirely within the area of the supplying authority.

That argument is constructed in this way. It is said that, there being a railway situated partly within and partly without an area, whenever on any point of that railway haulage takes place, it is haulage on a railway situated partly within and partly without that area ; and, accordingly it is said that when once it is ascertained that a railway extends into two areas, the section applies whatever the limitation on the haulage may be. It appears to me that to place that construction on the section would lead to very remarkable results, and I do not think it is in accordance with its language. What it is dealing with is haulage or traction on a railway situated partly within and partly without an area. In the context, I myself should have thought that that is referring not to traction on the part of the railway within one area, but to traction which passes from one area to another along the railway. Traction can only take place along a railway : and if instead of the word "on" the word "along," which has really the same meaning, had been used, there could be no question to my mind that the kind of haulage or traction to be effected by the use of electric power would be haulage or traction which does, or may, pass from one area to another along a railway situated partly within the one and partly within the other.

If that be the true effect of s. 5, the point really disappears. But that it is the true effect, quite apart from the language used, is confirmed by considering some of the results which might follow from the appellants' construction. One of them, pointed out by Romer L.J. in the course of the argument, will be sufficient. The section applies to tramways. If a tramway, constructed and operated entirely within one area, derived its supply from the undertakers for that area, and then extended its track into another area, the supply of electricity from the first undertaker to the part of the tramway within its area would ipso facto and necessarily become illegal. That consequence would follow notwithstanding the fact, if it were the fact, that the tramway company had obtained the supply for the new piece of its line from the authority in whose area it was situated. It seems to me that such a result would be quite absurd, and it confirms the construction which I would have placed on the language apart from any consideration of the results which might follow from adopting the construction the appellants put forward.

It is next said—turning to the railway company's side of the matter and away from the undertakers'—that the railway company are not the owners of a railway undertaking situated partly within and partly without the district of the Liverpool Corporation. The first point taken is that the line is a disconnected piece of line and cannot be treated as part of the undertaking which is situated in the Liverpool area. I am quite unable to accept that argument. " The railway under-"taking " is an expression in using which the Legislature must have had in mind the nature of the railway undertakings set up under the Act of 1921. It seems to me quite impossible to suggest that the word " undertaking " there does not include the whole of the undertaking of any railway so constituted.

It is then said that the word " undertaking," when applied to an amalgamating and absorbing undertaking, such as is the London Midland & Scottish Railway Company, must be read in reference to the history of the constitution of that unified undertaking. I understand that to mean that the Legislature, when it used the word " undertaking," must have remembered that the Wirral undertaking had at the time been a separate undertaking and must have used the word " under-"taking " in the light of that fact, and that the section must in some way be read as splitting up or disintegrating the present undertaking of the London Midland & Scottish Railway Company into the various undertakings which were amalgamated or absorbed into it. I am afraid that that argument

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is one to which I find it difficult to do justice. To impute to Parliament an intention, in enacting a section the language of which is perfectly apt to deal with the existing railway situation in 1926, to use a phrase which in view of that situation would have been entirely misleading, is to impute a fantastic intention; and it would impose on those whose duty it is to construe the section the obligation of in some way disintegrating the London Midland & Scottish Railway Company and other amalgamated railways into their component parts. I am unable to ascribe to Parliament any such fantastic intention, nor can I find any justification in the language for so doing.

There is another argument in relation to the Wirral undertaking—namely, that the only power of that undertaking to electrify its system is to be found in the Act of 1900 to which I have referred. Let me assume that that is the case. It is then said that the Act is a complete code laying down and delimiting the method by which that shall be done, and that s. 6 provides exhaustively for the obtaining of supplies from outside bodies. That section, it is said, is not merely a section empowering what was then the Wirral Company to enter into agreements for supply, but is a section which must be read as a prohibiting section, prohibiting the company from entering into agreements otherwise than in accordance with that section. I may say, in passing, that, in my view, the section is merely an enabling section, and to regard it as a prohibiting section is to treat it as having a purpose quite foreign to any purpose which it in fact has. It is not a saving section or a prohibiting section, but a pure enabling section. But it is then contended that, that being what I may call the "electrification code" relating to the Wirral Railway, when there is found, as in s. 47 of a general Act of Parliament, a provision conferring general powers on railway undertakings in relation to obtaining supplies of electricity, the rule "generalia specialibus non "derogant" must be applied; and the powers conferred by that section must be read as not intended to extend the powers conferred by s. 6 of the special Act, or do away with what are said to be the implied prohibitions contained in that section.

That argument seems to me to be based on a misconception. Sect. 6 of the Act of 1900 is, according to its language and according to the recital in the preamble which refers to it, an enabling section and nothing more. I can see no room for the application of the maxim to a case where, under a special Act dealing with a particular matter, a power is given and a general Act follows it, giving in general terms a wider power to companies or concerns of which that dealt with in the special Act is one. And that appears to me to be exactly what is happening in this case. Under s. 6 of the Act of 1900 certain limited powers with regard to taking electricity from supplying companies or bodies were given to the Wirral Railway. Under s. 47 extended powers were given to all railways which fell within the requirements of s. 47, and I cannot see how the maxim "generalia specialibus non derogant" can apply to such a case. The only way in which the argument can be made to have any semblance of attractiveness is by treating s. 6 as a prohibiting section, and then saying that an enabling section in a general Act must not be read as overriding a prohibition in the special Act. Had s. 6 been a section containing some sort of prohibition there would have been some force in that argument; but when once it is appreciated that it is in fact nothing of the kind the argument appears to me completely to fall to the ground.

I should here say, lest it be thought that I have overlooked the point, that the arguments with regard to the meaning of the word "undertaking" do not, in my opinion, derive any support from Part V. of the Railway Clauses Act, 1863.

The next matter, and I think the last one with which I need deal, is this. It is said that the power conferred by the section in the words "so supply electricity to be used for any purposes of "such undertaking, whether within or without such district "or area of supply," does not extend to a supply for haulage purposes because the existence of a power of supply for haulage or traction purposes within and without the area is an essential before the power can be exercised, and that the words "so "supply" refer back to a supply for such haulage or traction purposes, that accordingly there was no necessity to give a

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further power to supply for haulage or traction purposes, and that therefore the words " so supply electricity to be used for "any purposes of such undertaking" must be read as meaning " for any purposes of such undertaking other than the purposes "of haulage or traction." It seems to me that that would be to do quite unwarranted violence to the language of the section. I have already given my reasons for thinking that the supply for haulage or traction, which is a condition of the section coming into operation—that is, the power to supply and the de facto supply for haulage and traction—is not necessarily a supply for haulage or traction outside the area at all. Next, it seems to me that as a pure matter of English the word " so " in this context refers back, and refers back only, to " within "their district or area of supply," because that is the kind of supply with which the section is dealing, and those are the only words which really qualify the word " supply " at the beginning of the section. Further, when the Legislature uses the words " to be used for any purposes of such undertaking " I see no justification for reading the words " any purposes " in any sense other than that which they would naturally bear. That argument, again, is one which, in my opinion, has no foundation.

A further point can be made to counter the suggestion that it is only under s. 5 of the Electric Lighting Act, 1909, that the Liverpool Corporation could obtain their power of supply. It is to be noticed that there is a very important difference in language between the two sections. Sect. 5 refers to a supply of electricity for the purpose of haulage or traction on a railway situated partly within and partly without the area. Sect. 47 refers to a supply of electricity for haulage or traction to a company, being the owners of a railway undertaking situated partly within and partly without. Sect. 47 does not contemplate any continuity in the haulage between one area and another ; all that it requires is that there should be a company owning a railway undertaking physically situate within two districts, and a supply for haulage to that company is authorized quite irrespective of the question whether the company used that supply entirely within one area or partly

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within and partly without the area. That change in language appears to me to reinforce the argument which I have put forward on the construction of s. 5 and s. 47, but there is one other important change. The supply is to be to a company "being the owners or lessees of a railway . . . undertaking," not "on a railway," as in s. 5, and the words of s. 47 appear to me to be exactly apt to cover the case of the London Midland & Scottish Railway Company.

I think that I have said enough to dispose of the argument that on the facts of this case the Liverpool Corporation are not a corporation which may supply electricity. The next point is that it is said that they are not in fact supplying for haulage or traction. I have dealt with the matter whether the use for capstans and conveyors is haulage or traction, but I must now deal with an argument of a different nature. The actual supply being taken is a general supply, and part of it is being used for haulage or traction by means of the capstans and conveyors. It is said that a supply of that kind is not a supply for haulage or traction because there can only be such a supply if it is specifically earmarked for that purpose, and that purpose only. I am quite unable to put that construction on the words. It appears to me that where there is a supply for several purposes, one of which is haulage or traction, it is a supply for haulage or traction within the meaning of the section. It is said, in answer, that s. 12 of the Act points in the other direction because under that section a railway company are entitled to obtain from the undertaker a supply for haulage or traction at certain favourable rates, and that, accordingly, "supply for haulage or traction" in s. 47 must be limited to cases where s. 12 is brought into operation, and it can be said of the supply that it is a supply entitling the railway company to the special terms in s. 12.

It seems to me that there are two answers to that. The first is that s. 12 contains nothing to make it compulsory on the railway company to take a supply at that price, and therefore s. 47 must be dealing with both cases—the case where the railway company do, and the case where they do not, take advantage of s. 12. The second is that s. 12 only applies to a railway company, whereas s. 47 applies to any company "being the owners or lessees of a railway, dock, harbour or "canal undertaking." Accordingly, the argument based on s. 12, as limiting the meaning of supply for haulage or traction, could not be applied to the case of a dock, harbour or canal company. To me, the argument is not one which has any real weight.

I have endeavoured to deal with all the arguments which have been put forward, and, in my opinion, on the true construction of s. 47 and on the facts of this case, the section applies, the learned judge was perfectly right, and this appeal should be dismissed, with costs.

ROMER L.J. I entirely agree. The Master of the Rolls has dealt so fully with all the arguments addressed to us in support of the appeal that I feel that I cannot usefully add anything.

MACKINNON L.J. I agree with every word which has been used.

Appeal dismissed.

Solicitors: *Robins, Hay & Waters, for E. W. Tame, Town Clerk, Birkenhead; F. Venn & Co., for W. H. Baines, Town Clerk, Liverpool; Alexander Eddy.*

H. C. G.

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June 1, 2, 16; July 19.

In re SPENCE.

BARCLAYS BANK, LIMITED *v.* MAYOR, ETC., OF STOCKTON-ON-TEES.

[1936. S. 3988.]

Charity—Will—Gift of residue for purchase of suitable site for erection of a public hall—To be used by a municipal corporation for such public purposes as it may consider desirable—Gift of armour and antiques to the corporation to be kept in the public hall for the public use—Validity of gifts.

By his will G. O. S. gave his collection of arms and antiques to the corporation of a certain town on condition that they deposited the same in one of the rooms of the public hall hereinafter mentioned, where the collection should be open to inspection by the public. The testator gave the whole of his real and residuary personal estate to his executor and trustee upon trust for sale and conversion and, subject to the payment thereout of his funeral and testamentary expenses and debts and certain legacies and the setting apart of a sum to provide for a certain annuity mentioned in the will, upon trust to apply the proceeds of sale in the purchase of a suitable site in the said town and in or towards the erection on such site of a public hall, which site and hall when completed should be presented by his trustee to the said corporation to be used by them for such public purposes as they might consider desirable:—

Held, that the reference to " public purposes " in the will was limited to public purposes for the benefit of the inhabitants of the particular borough mentioned in the will and excluded any possibility of the hall being used for private purposes. The gift for the purchase of a site and the erection thereon of a public hall to be presented to the corporation was therefore a valid charitable gift.

Held, also, that the object of the bequest of arms and antiques was an educational object and the bequest was charitable.

Houston v. *Burns* [1918] A. C. 337 distinguished.

ORIGINATING SUMMONS.

By his will dated August 14, 1922, Gilbert Ormerod Spence (hereinafter called " the testator ") after appointing Barclays Bank, Ld., executor and trustee thereof, and after giving certain directions and a bequest of certain pecuniary legacies free of duty and an annuity, gave his collection of arms and antiques in the following terms: " I give my collection of "arms and antiques and articles de vertu to the corporation "of Stockton-on-Tees subject to the condition that the said "corporation shall deposit the same in one of the rooms of "the public hall hereinafter mentioned where the same shall "be kept open to inspection by the public subject to such "reasonable restrictions and regulations as may be imposed "by the said corporation."

The testator disposed of his real and residuary personal estate as follows: "I give devise bequeath and appoint the "whole of my real estate and the residue of my personal "estate unto the bank upon trust to sell call in and convert "into money the same and with and out of the moneys thereby "produced and with and out of my ready money to pay my "funeral and testamentary expenses and debts and the "legacies hereinbefore bequeathed and the duties thereon and "set apart such part thereof as may be necessary to provide "for the said annuity hereinbefore given and subject thereto "the said proceeds of sale shall be held upon trust to apply "the same in the purchase of a suitable site of land at Stockton-"on-Tees and in or towards the erection on such site of a "public hall which site and hall when completed shall be "presented by the bank to the corporation of Stockton-on-"Tees aforesaid in memory of my deceased father and mother "and to be used by the said corporation for such public "purposes as it may from time to time consider desirable and "the surplus (if any) shall be paid to the said corporation of "Stockton-on-Tees absolutely to be used by the said corpora-"tion for such public purposes as it may from time to time "consider desirable And I declare that any regulations made "or any use declared by the corporation of Stockton-on-Tees "shall be made and declared in such terms that if any special "provision or exemption be made in favour of residents in "Stockton-on-Tees the same shall also be expressly extended "to and in favour of and shall also include residents in "Thornaby-on-Tees."

The testator gave further directions to the bank relating to the appropriation and setting apart and investing of such a sum of money out of his estate as would when invested

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produce by the annual income thereof an annual sum equal to the amount of the annuity for the time being payable under his will and in the meantime to pay the said annuity out of his estate as therein mentioned.

The testator died on November 28, 1925, and the will was duly proved on January 12, 1926. The annuitant mentioned in the will died on July 12, 1936. During the life of the annuitant it was not possible to set aside a sufficient sum to purchase any suitable site in Stockton-on-Tees, and pending the erection of such a public hall as indicated in the will the collection of arms and antiques had to be temporarily housed in a warehouse belonging to the corporation of Stockton-on-Tees.

Questions having now arisen whether the trust of the testator's residuary estate for the purchase and erection of a public hall was a valid trust and whether the gift of the collection of armour and antiques which was dependent thereon was also a valid gift, an originating summons was taken out by the bank as executor and trustee of the will for the determination of (inter alia) the following questions: (1.) whether the trust to apply the residuary estate of the testator in the purchase of land at Stockton-on-Tees and the erection thereon of a public hall to be used by the corporation for such public purposes as it might consider desirable and to pay the surplus to the corporation to be used for such public purposes as the corporation might consider desirable was a valid trust either as a charitable gift or otherwise; (2.) whether the gift of the collection of arms and antiques and articles de vertu to the said corporation was valid as a charitable gift or otherwise; and (3.) if the gifts or either of them were valid as charitable gifts that a proper scheme might be settled by the Court.

F. Baden Fuller for the summons.

Gerald R. Upjohn for the corporation. The gift is a good charitable gift. For what may be considered charitable purposes, see Jarman on Wills, 7th ed., vol. i., p. 198. A public hall for public purposes is a charitable gift: see *Re*

Holburne. Coates v. *Mackillop.* (1) The words "public "purposes" here are relied on. The gift is in fact the gift of a hall for the public: see the remarks of Stirling J. in *In re Scowcroft. Ormrod* v. *Wilkinson.* (2) It is submitted that the case of *Houston* v. *Burns* (3) will not apply, because in that case the gift was held void for uncertainty. [He referred also to *In re Hadden. Public Trustee* v. *More* (4); *In re H. J. Ogden. Brydon* v. *Samuel* (5); *In re Garrard. Gordon* v. *Craigie.* (6)]

E. M. Winterbotham for a party claiming as next of kin to be interested in the event of an intestacy. The gift here cannot be given effect to. The corporation can under the terms of this will use the hall in any way they think fit. There is no gift for any particular class. The trust is not limited to charitable purposes but to general purposes not wholly charitable. Compare the remarks of Lord Davey in *Blair* v. *Duncan* (7), and see *Houston* v. *Burns.* (3) See also *In re Pitt Rivers. Scott* v. *Pitt Rivers* (8); *In re Davidson. Minty* v. *Bourne.* (9) The gift, owing to the wording of the will, is void for uncertainty.

A. Andrewes Uthwatt and *J. W. Brunyate* for the Attorney-General.

Cur. adv. vult.

1937. July 19. LUXMOORE J. The testator by his will dated August 14, 1922, made certain bequests in favour of the corporation of Stockton-on-Tees. The questions raised by this summons are directed to ascertaining whether all or any of those bequests are invalid. It is agreed that the answer in each case depends on the determination of the question whether the gift is charitable. If it is, the gift is valid; if not, the subject-matter of the gift is undisposed of and passes as on an intestacy.

The first bequest is of a collection of arms and antiques. It is in these terms: "I give my collection of arms and antiques

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(1) (1885) 53 L. T. 212.
(2) [1898] 2 Ch. 638, 642.
(3) [1918] A. C. 337.
(4) [1932] 1 Ch. 133.
(5) [1933] Ch. 678.
(6) [1907] 1 Ch. 382.
(7) [1902] A. C. 37, 44.
(8) [1902] 1 Ch. 403.
(9) [1909] 1 Ch. 567.

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"and articles de vertu to the corporation of Stockton-on-Tees "subject to the condition that the said corporation shall "deposit the same in one of the rooms of the public hall "hereinafter mentioned where the same shall be kept open "to inspection by the public subject to such reasonable "restrictions and regulations as may be imposed by the said "corporation." The second bequest is of the proceeds of sale and conversion of the testator's real and residuary personal estate after payment of funeral and testamentary expenses and debts and the legacies bequeathed by him and the due provision of an annuity. The material trust is "to apply the same "[that is the residue] in the purchase of a suitable site of land "at Stockton-on-Tees and in or towards the erection on such "site of a public hall which site and hall when completed shall "be presented by the bank (that is by the trustee) to the "corporation of Stockton-on-Tees aforesaid in memory of "my deceased father and mother and to be used by the said "corporation for such public purposes as it may from time to "time consider desirable." This bequest is followed by a direction that "the surplus (if any) shall be paid to the said "corporation of Stockton-on-Tees absolutely to be used by the "said corporation for such public purposes as it may from time "to time consider desirable." The testator further declared "that any regulations made or any use declared by the "corporation of Stockton-on-Tees shall be made and declared "in such terms that if any special provision or exemption be "made in favour of residents in Stockton-on-Tees the same "shall also be expressly extended to and in favour of and shall "also include residents in Thornaby-on-Tees."

The corporation of Stockton-on-Tees are anxious to obtain the benefit of all these bequests; but there is a difficulty in the acceptance of the collection of arms and antiques unless the gift of the public hall is valid, because the corporation have no room for its display and would, I am told, in the circumstances reluctantly have to refuse the gift.

I propose first to consider the question of the validity of the gift of a public hall. It is well settled that a gift for the benefit of the inhabitants of a particular locality, such as a town or a county, is a good charitable gift: see *Goodman* v. *Mayor of Saltash.* (1) In that case Lord Selborne L.C. said a "gift "subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such "inhabitants, is (as I understand the law) a charitable trust." Gifts of such a nature fall within the fourth class of charitable gifts enumerated by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel.* (2) This class is defined as embracing gifts for "other purposes beneficial to the "community"—not being trusts for the relief of poverty or for the advancement of education or religion.

There are many cases in the books dealing with this class of gift. It is, I think, impossible to classify them or deduce any fixed principle from them. It is sufficient to say that the mere fact that the object of the gift may be beneficial to the community does not of itself make the gift charitable. Before referring to any of the authorities cited in argument, it is convenient to consider the precise language of the will and to determine its scope and nature. It is a gift of the proceeds of sale of the testator's residuary estate to the trustee, who is directed to apply it first in the purchase of a site at Stockton-on-Tees and then in or towards the erection on that site of a public hall. The site and hall when completed are to be presented by the trustee to the corporation of Stockton-on-Tees. Pausing here it seems fairly plain that the site and public hall are to become part of the property of the corporation of Stockton-on-Tees and accordingly are to be held, like its other corporate property, for the benefit of the borough. If there was nothing else in the will it would appear that this would be a valid charitable gift; but it is argued that the gift is rendered invalid because the hall is to be a "public hall," and is to be used for "such public purposes as the corporation may from "time to time consider desirable." It is to be observed that one of the purposes declared by the testator is that one of the rooms in the public hall is to be used for the housing and exhibition to the public of the testator's collection.

In my judgment the reference to "public purposes" in this will is limited to public purposes for the benefit of the inhabitants of the borough of Stockton-on-Tees and is used in order to exclude any possibility of the hall being used for private purposes and in contradistinction to any such private user. The fact that the subject-matter of the gift is to be conveyed to the corporation appears to be of first importance in considering the validity of the gift. The corporation could not employ the hall for the purposes of members of the corporation in their private capacity, but must use it as a public institution for the benefit of the inhabitants of Stockton-on-Tees. In this connection I would refer to a passage in the judgment of Chitty J. in *Re Holburne. Coates* v. *Mackillop.* (1) In that case the object of certain bequests to trustees was not defined in the will but was set out in contemporary correspondence in such manner as to constitute a trust. The object of the trust was to form an art museum in Bath to be called the Holburne Museum. The material passage in the judgment is on p. 215, where the learned judge said : " It is argued for the next of kin "that the letters, according to their true construction, do not "show that the collection and the funds are to be held for public "purposes exclusively, and consequently that there is no "charity, and it is contended accordingly that the trust is void "for perpetuity or for uncertainty. As part of this argument "it is urged that the trustees might consistently with the "trust employ the collection and funds, or part of them, for "private purposes, such, for instance, as the enjoyment of the "museum by themselves and their friends, and such other "private individuals as they might in their discretion choose "to admit to the collection. But I think that a public purpose "or general utility, to the exclusion of private benefits, is "sufficiently shown on the face of the documents. The "collection is to bear the name of 'Holburne,' or 'Holburne of " 'Menstrie' ; it is to be maintained and preserved for ever ; "it is to form an art museum in Bath. No doubt there are to "be found in this country some instances of private museums, "but they are comparatively rare. Most of the museums are "public institutions. I consider that, according to the fair

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(1) (1882) 7 App. Cas. 633, 642.

(2) [1891] A. C. 531, 583.

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(1) 53 L. T. 212, 215.

"reading of the letters, 'Museum in Bath' does not mean merely "that the collection is to be kept in Bath, but that it is to be "kept in Bath as a public institution for the benefit of the "inhabitants of that city, and such other persons, members of "the public at large, as may from time to time visit the city." It is true that the subject-matter of the gift was an art museum; but the passage to which I have referred is not based on any educational aspect of the gift but on the wider view that the gift was for the benefit of the inhabitants of Bath and as such was a public charity.

It was argued that the present case was governed by the decision in *Houston* v. *Burns.* (1) In that case the gift in question was to a number of individuals as trustees and was to be applied by them "for such public, benevolent or charitable purposes "in connection with the parish of Lesmahagow or the neigh"bourhood in such sums and under such conditions as they in "their discretion shall think proper." The House of Lords held that the gift was void for uncertainty notwithstanding the express limitation to the particular locality named. The ground of the decision was that if the clause was to be construed (as in fact it was construed by the House of Lords) as being for such public, or benevolent or charitable purposes connected with the locality as the trustees thought proper, it was bad because the purpose was too vague and the vagueness of the purpose was not cured by the specification of the locality to be benefited: see the judgment of Lord Finlay L.C.; but the learned Lord Chancellor pointed out in his speech that in the case of a gift of this nature the addition of a local limit might well make a difference in favour of its validity if the gift "was in favour of institutions within a certain area, the "particular institution to be selected by the trustee." Lord Atkinson said in the course of his judgment: "It is the in"sufficiency of these words 'public purposes,' because of their "vagueness and uncertainty, to identify and fix the limits "of the class of individuals or objects from which the trustees "are to choose that renders void a bequest for 'public purposes.' "That is their weakness, and that weakness is not cured by

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(1) [1918] A. C. 337, 341, 343, 345, 348.

"coupling them with a definition or description of the physical "area within which the public purposes are to be comprised." But he went on to point out that the case under consideration had no resemblance "to those in which property is vested in "trustees to be applied for the support or benefit of such "institutions of a particular class as may be in existence, or "in the course of creation, in any given town or area at the "time at which the will speaks. There is no vagueness or "uncertainty in such cases at all."

And Lord Shaw said: "Local limitations expressed by the "words 'in connection with the parish of Lesmahagow or "'the neighbourhood' do not add any definiteness to the class "of purposes or objects which it was in the mind of the testator "to benefit or promote. The foundation of political clubs, "schools of art, a zoological garden, or an astronomical "observatory in Lesmahagow, along with a thousand other "things in connection with that parish or its neighbourhood, "might, in the trustees' opinion, be excellent, but the bequest "is void by reason of the uncertainty as to which of them or "which class of them the trustee meant to favour. This is "exactly the reason which invalidates the bequest where there "is no geographical reference. Local limitations do come into "play and make the bequest effective if and when they provide "the means of identifying the particular objects or institutions "which the testator has meant to benefit."

The ratio decidendi in *Houston* v. *Burns* (1) was the vagueness of the testatrix's directions and her failure to identify the particular objects meant to benefit. In the present case the testator has been guilty of no such failure. The object is clearly defined. It is a public hall. The fact that the testator has directed it to be conveyed to the corporation of Stockton-on-Tees shows with certainty that the public hall is to be for the benefit of the inhabitants of Stockton-on-Tees, and this certainty is not rendered uncertain by reason of the fact that the testator has limited its user to "such public purposes" as the corporation may consider desirable.

In my judgment the gift for the purchase of a site and the erection on it of a public hall to be presented to the corporation of Stockton-on-Tees is a valid charitable gift, and I so declare.

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(1) [1918] A. C. 337, 348.

With regard to the gift of the collection of arms and antiques somewhat different considerations apply. Having regard to my declaration respecting the public hall, it is probable that no difficulty will arise. It is necessary however to determine whether it is a good charitable gift. The object of the gift is to allow the collection to be inspected by the public. This is an educational object and is therefore charitable. Accordingly even if the corporation should refuse the gift, the gift would not fail, and in such case a scheme would be necessary for its application cy-près.

The remaining gift is of the surplus (if any) of the residue after the purchase of the site and erection of the public hall to the corporation of Stockton-on-Tees absolutely to be used by the corporation for such public purposes as it may from time to time consider desirable. It cannot at present be ascertained whether there will be any such surplus, because this must depend on the amount which the trustees decide to expend on purchasing the site and erecting the public hall. If they decide to expend the whole of the available residue the question as to the validity of the gift of the surplus will be purely academic. In these circumstances I do not propose to deal with it. It will be sufficient to direct that this question shall stand over with liberty to restore if and when the occasion for its determination arises.

Solicitors: *Gibson & Weldon, for Archer, Parkin & Townsend, Stockton-on-Tees; Grey & Co., Weston-super-Mare; Bell, Brodrick & Gray, for T. Downey, Town Clerk, Stockton-on-Tees; Treasury Solicitor.*

A. R. LL.-T.

FARWELL J.

1937

July 6.

DONOGHUE *v.* ALLIED NEWSPAPERS, LIMITED.

[1936. D. 894.]

Copyright—No copyright in author of an idea—Copyright in person who puts idea into form—Onus on defendants—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 6.

There is no copyright in an idea. Where a person communicates an idea to an author and the author clothes the idea in the form of an article or articles, the copyright is in the author.

Evans v. *E. Hulton & Co., Ld.* (1924) Macgillivray's Copyright Cases, 1923–28, 51, followed.

Semble : Where articles in a newspaper about A are published under a title indicating that A is the author of the articles and A brings an action for infringement of copyright, the onus of proof that A is not the owner of the copyright is thrown on the defendants under s. 6 of the Copyright Act, 1911.

WITNESS ACTION.

In 1931 the persons responsible for the Sunday newspaper the News of the World, owned by the defendant company, were desirous of publishing a series of articles dealing with the racing career of the plaintiff. They employed a Mr. Felstead, who entered into negotiations with the plaintiff, and on April 4, 1931, the plaintiff signed the following agreement : " I agree to supply the Proprietors of the News of the World "material for approximately 50,000 words relating to my "experience on the Turf and other matters within my knowledge, "for the sum of 2000*l.* payment to be made as follows :—500*l.* "on the signing of this contract (receipt of which I hereby "acknowledge) and the remaining 1500*l.* when Mr. S. T. Felstead, "acting on behalf of the News of the World, has written up the "material for publication and has it approved by me for use "and delivered the copy to you. In consideration of the "above-mentioned remuneration, I undertake that I will not "in the course of completing this contract supply any material "for publication to any other newspaper firm whatsoever."

Following that there were various interviews between the plaintiff and Felstead, at which Felstead made notes, as the conversations went on, of the various matters and material with which the plaintiff supplied him, and he then proceeded to write up the articles required. When an article was in type, or in manuscript form, Felstead took it to the plaintiff and read it over to him, and from time to time the plaintiff suggested various alterations, which alterations were written in by Felstead in the margin, but these alterations were not always adopted in the form in which the articles appeared. There were several articles, and they appeared Sunday after Sunday in the News of the World under the heading "Steve "Donoghue's Racing Secrets"; "Enthralling Stories of the "King of Sports," and the first one, appearing on May 17, 1931, was called "My Greatest Derby." Parts of them were in the form of dialogues, and appeared on the face of them to be records of the actual dialogues that took place between the plaintiff and Felstead.

In 1936 Felstead was anxious to make some use of the articles that had appeared in the News of the World. At that time a Mr. Lees was concerned in the publication of a paper known as Guide and Ideas, and Felstead suggested to him that the articles which had been published in the News of the World should be brought up to date and reduced in length. Felstead was paid 300*l.* and he endeavoured to persuade the plaintiff to consent to the publication of the articles. There was a conflict of evidence as to what then took place, and his Lordship accepted the plaintiff's evidence that Felstead offered him 150*l.* or 200*l.*, but that he, the plaintiff, refused to have anything to do with the matter. In a letter, dated May 20, 1936, and written to Felstead, the proprietors of the News of the World gave their consent to the publication of the new articles. The first article appeared in Guide and Ideas on May 23, 1936, under the heading "My Racing Secrets. By Steve Donoghue." The plaintiff, through his solicitors, complained, and the further publication of the articles was stopped. The plaintiff then commenced this action, in which he asked for damages for infringement of copyright and an injunction to restrain the defendants from printing, publishing, selling or otherwise circulating the articles.

Sir Patrick Hastings K.C. and *A. A. Gordon Clark* for the plaintiff. The owner of the copyright in cases like this is the person who originates the story. Here the plaintiff originated all the stories that appeared in the articles published in 1931. Further, the only value of those articles was that they were written about the plaintiff, whose name was well known to the public.

Fergus Morton K.C. and *F. E. Skone James* for the defendants. The agreement of April 4, 1931, was an agreement that the copyright in the articles, when published, should belong to the News of the World.

The defendants cannot say that the plaintiff was under a contract of service, and s. 5, sub-s. 1 (*b*), of the Copyright Act, 1911, does not apply, but sub-s. 3 does apply. (1) The articles were not copyright in news supplied by the plaintiff, but in the articles written up by Felstead for the News of the World. They therefore became vested in the News of the World by way of equitable assignment. The sole author was Felstead; the plaintiff only supplied incidents in his life. *Evans* v. *E. Hulton & Co., Ld.* (2) is the nearest case to the present, and the judgment of Tomlin J. applies. The decisions in *Springfield* v. *Thame* (3); *A. & C. Black, Ld.* v. *Claude Stacey, Ld.* (4); and *Tate* v. *Fullbrook* (5) are to the same effect.

Gordon Clark in reply. In all these cases the question of authorship depends entirely on the facts in each particular case. In *Evans* v. *E. Hulton & Co., Ld.* (2) the decision was on the facts of that case. There the author of the idea merely gave the idea to another, who wrote it down and then made it up into an article, and the interest in the article was the subject-matter of the idea. Here the plaintiff supplied all the materials for the articles, and their interest lay in the fact that they were about incidents in the life of the plaintiff, whose name was well

(1) Sect. 5, sub-s. 3: "Where, "under any partial assignment of "copyright, the assignee becomes "entitled to any right comprised "in copyright, the assignee as "respects the right so assigned, "and the assignor as respects the "rights not assigned, shall be "treated for the purposes of this "Act as the owner of the copy-"right, and the provisions of this "Act shall have effect accordingly."

(2) Macgillivray's Copyright Cases, 1923–28, 51.

(3) (1903) 89 L. T. 242.

(4) [1929] 1 Ch. 177.

(5) [1908] 1 K. B. 821.

known to the public. If Dr. Johnson had said to Boswell that he wanted his sayings put in book form the copyright could not be said to be in Boswell.

In the agreement of April 4, 1931, the plaintiff only restricted himself by agreeing not to give material to other newspapers during the publication of the articles. The News of the World had no interest in the articles once they were published.

FARWELL J. The first question that I have to determine is whether the plaintiff is or is not either the sole or the joint owner of the copyright in the original articles which appeared in the News of the World. If the plaintiff has no copyright, either as sole owner or as joint owner, in these articles, this action necessarily fails, and it will be unnecessary for me to consider the further question which I shall have to consider if that is not the position—namely, as to the effect of the agreement of April 4, 1931, and whether that agreement amounts to an equitable assignment of the plaintiff's copyright to the News of the World.

It is necessary, in considering whether the plaintiff is the owner or part owner of the copyright in this work, to see in what it is that copyright exists under the Copyright Act of 1911. This at any rate is clear beyond all question, that there is no copyright in an idea, or in ideas. A person may have a brilliant idea for a story, or for a picture, or for a play, and one which appears to him to be original; but if he communicates that idea to an author or an artist or a playwright, the production which is the result of the communication of the idea to the author or the artist or the playwright is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play, or a book, and the owner of the idea has no rights in that product.

On the other hand, and this I think is equally plain, if an author employs a shorthand writer to take down a story which the author is composing, word for word, in shorthand, and the shorthand writer then transcribes it, and the author has it published, the author is the owner of the copyright and not the shorthand writer. A mere amanuensis does not, by taking down word for word the language of the author, become in any sense the owner of the copyright. That is the property of the author.

The explanation of that is this, that that in which copyright exists is the particular form of language by which the information which is to be conveyed is conveyed. If the idea, however original, is nothing more than an idea, and is not put into any form of words, or any form of expression such as a picture, then there is no such thing as copyright at all. It is not until it is (if I may put it in that way) reduced into writing or into some tangible form that there is any copyright, and the copyright exists in the particular form of language in which, or in the case of a picture the particular form of the picture by which, the information or the idea is conveyed to those who are intended to read it or to look at it.

In the present case, the ideas of all these stories, apart altogether from what one may call merely the embellishments which were undoubtedly supplied wholly by Mr. Felstead—the ideas of all these stories, and in fact the stories themselves, were supplied by the plaintiff; but in my judgment, upon the evidence it is plain that the particular form of language by which those stories were conveyed was the language of Mr. Felstead and not of the plaintiff. Although many of the stories were told in the form of dialogue, and to some extent Mr. Felstead no doubt tried to reproduce the story as it was told to him by the plaintiff, nevertheless the particular form of language in which those adventures or stories were conveyed to the public was the language of Mr. Felstead and not the language of the plaintiff.

One case has been cited to me which is, I think, very near to the present one, and if I were to decide in favour of the plaintiff on this first point I think that I should be disregarding the decision of Tomlin J. in *Evans* v. *E. Hulton & Co., Ld.* (1) The facts of that case are not quite on all fours with the present one; but the principle upon which that judgment rests is the same as that which I have to apply in this case.

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(1) Macgillivray's Copyright Cases, 1923–28, 51.

In that case the person who supplied the information was a foreigner, and no doubt he did not convey the information in a form which would have been suitable for an article in a newspaper, and to that extent it may be that the person who wrote it down and supplied the article had more to do than Mr. Felstead in the present case; but the principle applicable is the same. What Tomlin J. said was this (1): "One thing "is reasonably plain, I think, that probably Mr. Zeitun would "not himself claim that he was capable of producing in the "English tongue a literary work which would find a market. "He certainly agreed that he has never attempted to do so, and "I should doubt his capacity to do so. The fact that he is the "subject-matter of the production in the sense that it is an "incident from his life, for which he provided the material, "does not seem to me to make him in any sense the joint author "with Mr. Evans of the manuscript which was in fact written, "and, upon the facts which I have stated, I find that he did "not take any part in producing the express matter which is the "original literary work, the subject-matter of copyright."

What I understand the learned judge to mean by the "express matter" is that which I have endeavoured to define as the particular form of language in which the information is conveyed, and although it may be that in the present case the plaintiff could give more help to Mr. Felstead than Mr. Zeitun could give in the case of *Evans* v. *E. Hulton & Co., Ld.* (2), to the author of the manuscript, nevertheless, although the plaintiff supplied all the substance of the articles, it was conveyed in language which was the language of Mr. Felstead, and for which the plaintiff himself was not responsible.

I confess that I come to this conclusion, namely, that the plaintiff has failed to show that he is the owner or part owner of the copyright in these articles, with some regret. The articles in this paper Guide and Ideas were published as being the adventures of Steve Donoghue entitled "My Racing "Secrets. By Steve Donoghue," and no doubt that was so because, both in that case and in the earlier case, the persons

(1) Macgillivray's Copyright Cases, 1923–28, 51, 56.
(2) Ibid. 51.

who are responsible for the papers desired to lead the public to believe that what they were reading was something of which Steve Donoghue himself was the author, and I think that so describing the articles does have the effect, under s. 6 of the Copyright Act, 1911 (1), of throwing the onus on the defendants. But notwithstanding that, it appears to me that I am forced to come to the conclusion—although as I say, rather unwillingly—that the plaintiff was not the author, or even the joint author, of the articles in the News of the World. If that be so, it must necessarily follow that he cannot maintain this action.

It is unnecessary, in the view that I take of the matter, to deal with the question whether the agreement of April 4, 1931, operated as an equitable assignment or not; but, as this case may go further, I should say this, that on the question of fact whether Mr. Donoghue ever agreed or consented to the publication of the second series of articles, on the evidence that I have heard, having seen the witnesses in the witness-box and heard them cross-examined, my view is that the account given by the plaintiff is the right one, and that he never did consent, and if his consent was necessary, it never was obtained.

That is not, of course, material upon the view that I take of this matter, and upon the short ground that the plaintiff is not the owner or the joint owner of the copyright in the articles in question, the action is dismissed with costs.

Solicitors for plaintiff: *W. H. Court & Son.*

Solicitors for defendants: *Theodore Goddard & Co.*

(1) Sect. 6, sub-s. 3: "In any "action for infringement of copy-"right in any work, the work shall "be presumed to be a work in "which copyright subsists and the "plaintiff shall be presumed to be "the owner of the copyright, unless "the defendant puts in issue the "existence of the copyright, or, as "the case may be, the title of the "plaintiff, and where any such "question is in issue, then—

"(*a*) if a name purporting to "be that of the author of the "work is printed or otherwise "indicated thereon in the usual "manner, the person whose "name is so printed or indicated "shall, unless the contrary is "proved, be presumed to be the "author of the work;"

P. J. B.

[COMPANIES COURT.]

In re B. P. FOWLER, LIMITED.

CROSSMAN J.

1937
July 22, 23.

[No. 0027 of 1937.]

Company — Winding-up — Fraudulent Preference — Set-off—Companies Act, 1929 (19 & 20 *Geo.* 5), *s.* 265.

A company carrying on the business of road contractors purchased its materials from two supply companies. By the custom of the trade the supply companies made advances from time to time to the company. One of the supply companies was indebted to the company on tar-paving contracts. Within three months of the winding-up of the company the company paid to the supply companies sums for goods supplied by them in circumstances which made any payment by the company to the supply companies a fraudulent preference, and during the same period one of the supply companies made advances from time to time to the company and the other supply company paid to the company sums due on account of the tar-paving contracts. There was no identity of dates or amounts between the payments and the advances and all the transactions were entered in separate accounts :—

Held, that, as there had been no attempt to set-off the advances and payments to the company against the payments made by the company, all the payments by the company were a fraudulent preference.

In re Washington Diamond Mining Co. [1893] 3 Ch. 95 explained.

ADJOURNED SUMMONS.

This was a summons issued in the winding-up of B. P Fowler, Ld., by the liquidator, Henry Arthur Van De Linde, claiming the repayment by the respondents, Wirksworth Quarries, Ld., and Inns & Co., Ld., of certain moneys alleged to have been paid to those companies respectively by B. P. Fowler, Ld. (hereinafter called " the company "), by way of fraudulent preference. The company carried on business as contractors for tar paving and similar work. Wirksworth Quarries, Ld., carry on the business of quarry owners and manufacturers of road material, consisting in the main of crushed stone treated with tar. Inns & Co., Ld., carry on the business of sand and gravel merchants. Wirksworth Quarries, Ld., are a subsidiary company of Inns & Co., Ld. The same persons are managing directors of the two companies. The company had been for a considerable time a customer of both the respondent companies.

On January 13, 1937, a petition was presented to wind up the company, and on January 25, 1937, an order was made upon that petition to wind up the company and the Official Receiver became the liquidator. On March 4, 1937, Henry Arthur Van De Linde was appointed liquidator in place of the Official Receiver. It appeared from the books of the company that between October 13, 1936 (three months before the presentation of the petition), and January 13, 1937, the company paid to Wirksworth Quarries, Ld., various sums at different times amounting in the aggregate to 3203*l.* 17*s.* 2*d.* It also appeared from the books that between those dates the company paid to the respondents, Inns & Co., Ld., two sums of 270*l.* and 47*l.* It also appeared from the correspondence which came to the hands of the liquidator that on and before October 13, 1936, the company were being pressed by various creditors for payment of the amounts due to them, and in particular Constable, Hart & Co., Ld., were pressing the company for payment of 2475*l.* 8*s.* 3*d.*, the amount due to them. In answer to a letter of Constable, Hart & Co., Ld., dated October 15, 1936, the company sent to them a copy of the company's accounts to February 29, 1936, enclosed in a letter expressing the directors' regret that it was not possible to send a cheque for the amount due. It appeared from the accounts that at the date of the winding-up the company was hopelessly insolvent, and that between October 13, 1936, and January 13, 1937, the company was unable to pay its debts when they became due.

On June 28, 1937, the liquidator issued this summons, to which both Wirksworth Quarries, Ld., and Inns & Co., Ld., were respondents, claiming as against Wirksworth Quarries, Ld., a declaration that each of the said sums which had been paid to them by the company between October 13, 1936, and January 13, 1937, was an undue and fraudulent preference of the respondents over the other creditors of the company under s. 265 of the Companies Act, 1929, and invalid accordingly, and an order that these respondents should pay those sums, totalling 3203*l.* 17*s.* 2*d.*, to the liquidator, and claiming against the respondents Inns & Co., Ld., that each of the said payments of 270*l.* and 47*l.* was an undue and fraudulent preference of these respondents over the other creditors of the company, and invalid accordingly, and an order that Inns & Co., Ld., should pay the sums of 270*l.* and 47*l.* to the liquidator and that the said respondents should pay the costs of the application to the liquidator. An affidavit was filed on behalf of both the respondents by John James Reid, a member of the firm of J. W. Best & Co., chartered accountants, who were the auditors of both the respondent companies. He stated that the company had for a considerable time been customers of the respondent companies, and that it was the custom for paving contractors like the company to be financed by quarry owners and manufacturers who supply them with materials, and that, in accordance with that custom, Inns & Co., Ld., and Wirksworth Quarries, Ld., had financed the company by loans. Between January, 1936, and the date of the winding-up the company were carrying out contracts with county councils and other customers, and advances were made for this purpose by Inns & Co., Ld., and Wirksworth Quarries, Ld., which it was intended should be repaid as customers paid for the work done. This was done in due course without any improper or fraudulent intention by the directors of the company. He admitted, however, that the payments within three months of the winding-up came within s. 265 of the Companies Act, 1929, but claimed that the respondent companies were entitled to a set-off to the following extent. The accounts exhibited to this affidavit showed that in the case of Wirksworth Quarries, Ld., the company had three accounts:—

(1.) A loan account on which there was owing to Wirksworth Quarries, Ld., on October 13, 1936, 845*l.*, which sum was repaid by the company in November, 1936—the payments in fact amounting to 853*l.*

(2.) A trading account for tar-paving work done by the company for Wirksworth Quarries, Ld., amounting in all to 1145*l.* 2*s.* 6*d.*, all of which had been paid off by Wirksworth Quarries, Ld., by cheque before the winding-up. Of these, cheques amounting to 595*l.* 2*s.* 6*d.* were paid by Wirksworth Quarries, Ld., to the company after October 13, 1936.

(3.) A trading account for goods supplied to the company by Wirksworth Quarries, Ld., in respect of which the company owed Wirksworth Quarries, Ld., 1952*l.* 4*s.* 3*d.* on October 13, 1936, and 2350*l.* 17*s.* 2*d.* on January 13, 1937. The whole of this sum of 2350*l.* 17*s.* 2*d.* was paid by the company to Wirksworth Quarries, Ld. after October 13, 1936.

Inns & Co., Ld., had supplied goods to the company before October 13, 1936, to the value of 88*l.* 3*s.* 3*d.*, payment for which was made by the company by cheques after October 13 ; but Inns & Co., Ld., had made loans to the company amounting to 325*l.*, of which 115*l.* was advanced after October 13, and these were repaid by the company by two cheques for 270*l.* and 47*l.* and a transfer of 8*l.* in November, 1936.

The respondent companies claimed that these payments merely amounted to an interchange of cheques, so that the respondent companies in fact paid back to the company part of what the company had paid to them. Had there been no such payments the respondent companies would have been entitled to a set-off of the sums paid by them, and he claimed that the same result should be allowed in the circumstances.

The summons was heard on July 22 and 23, 1937.

Maurice Berkeley for the liquidator. It is admitted by the respondents that the amounts claimed by the liquidator were a fraudulent preference of the respondents by the company within the meaning of s. 265, but they claim to be entitled to a set-off of a portion of such amounts. It is clear that at the time of the payments the company was hopelessly insolvent. There is nothing in the dealings of the company with either of the respondents as shown in the accounts to suggest any right to set off. The company was indebted to the respondents in the amounts claimed and paid them these amounts during three months before the presentation of the petition for winding-up, and during the same time each of the respondents made payments to the company on other accounts in their ordinary course of dealings; but there was no identity of dates between the payments, and no identity of the amounts paid by the respondents respectively and the amounts paid to them in the course of business nor any suggestion that one was intended to be set off against the other.

R. J. T. Gibson for the respondents. The respondents are entitled to set off against the payments to them during the three months the payments they made to the company during that period. This, I submit, appears from the judgments in *In re Washington Diamond Mining Co.* (1) That case decides that, for the purpose of determining whether there has been a fraudulent preference, there cannot be a set-off of debts against calls; but the judgments recognize that there can be a set-off of debts against debts. The custom was for the advances to be repaid out of the payments by the company for materials supplied, and the payments and the advances were all part of one transaction. It was nothing more than an interchange of cheques. The only amount which can be considered to be a fraudulent preference is the balance between the debts paid by the company within the period of three months and the payments made to the company within the same period. To this extent the respondent companies have merely put back into the company what was paid to them.

CROSSMAN J. In this case the liquidator of B. P. Fowler, Ld., makes a claim by summons against the two respondents Wirksworth Quarries, Ld., and Inns & Co., Ld., for a declaration that certain payments specified in the summons made by the company to these two respondents were an undue and fraudulent preference of those two respondents over other creditors of the company under s. 265 of the Companies Act, 1929, and are invalid accordingly, and an order for the payment of those sums to the liquidator. The sums which the liquidator claims that he is entitled to be paid by the respondents Wirksworth Quarries, Ld., amount to

(1) [1893] 3 Ch. 95.

3203*l.* 17*s.* 2*d.*, and the amount which he claims that he is entitled to be paid by the respondents Inns & Co., Ld., is 317*l.* The only question with which I am now concerned is whether the respondents are liable for the whole of those sums, or are only liable for parts of those sums on the ground that they are entitled to a set-off as between payments made by them to the company and payments made by the company to them.

The respondents admit that the payments made by the company to them are liable to be set aside to some extent, and that the aggregate payment to the Wirksworth Quarries, Ld., is liable to be set aside, except as to 595*l.* 2*s.* 6*d.*, and that the aggregate payment to Inns & Co., Ld., is liable to be set aside, except as to 88*l.* 3*s.* 3*d.*

The company had considerable dealings with both the respondent companies. Wirksworth Quarries, Ld., are the owners of quarries, and they produce road material, and Inns & Co., Ld., are sand and gravel merchants. In each case the two respondents supplied goods to the company and made loans to the company, and in that way the company became indebted to them, and Wirksworth Quarries, Ld., became indebted to the company for work done by the company. During the three months prior to the commencement of the winding-up, which dates from January 13, 1937, when the winding-up petition was presented, payment appears to have been made to these two respondent companies of the sums owing to them for goods supplied. There is no doubt about that, and there is no doubt that, in the circumstances, which Mr. Gibson admits, these payments were to a very large extent fraudulent preferences within the meaning of s. 265 of the Companies Act, 1929, which provides that "Any conveyance, "mortgage, delivery of goods, payment, execution or other "act relating to property which would, if made or done by or "against an individual be deemed in bankruptcy a fraudulent "preference, shall, if made or done by or against a company, "be deemed, in the event of its being wound up, a fraudulent "preference of its creditors, and be invalid accordingly." Sect. 44 of the Bankruptcy Act, 1914, provides that " Every "conveyance or transfer of property, or charge thereon, made, "every payment made, every obligation incurred, and every "judicial proceeding taken or suffered by any person unable "to pay his debts as they become due from his own money "in favour of any creditor, or of any person in trust for any "creditor, with a view of giving such creditor a preference over "the other creditors, shall, if the person making, taking, paying "or suffering the same, is adjudged bankrupt or a bankruptcy "petition presented within three months after the date of "making, taking, paying or suffering the same be deemed "fraudulent and void as against the trustee in bankruptcy." The important words are " With a view of giving such "creditor, or any surety or guarantor for the debt due to such "creditor, a preference over the other creditors." I start with the admission that the payments made by the company to the respondents or considerable parts of them, were made with a view of giving preference to the respondents over the other creditors of the company. Mr. Gibson contends that the respondents are entitled to have deducted from the sums that they are liable to repay to the company on the ground of fraudulent preference certain sums which he says they were entitled to set off against the payments made to them, and he relied upon the judgments in the case of *In re Washington Diamond Mining Co.* (1)

The headnote there is "Held, that in applying s. 48 of the Bank-"ruptcy Act, 1883"—which is now s. 44 of the Bankruptcy Act, 1914—"to limited companies in pursuance of s. 164 of the Com-"panies Act, 1862"—which is now s. 265 of the Companies Act, 1929—"the special legislation applicable to such companies must "be regarded, and that, though a set-off of mutual debts "within three months of the bankruptcy of an individual is "not a fraudulent preference, such a set-off within three "months of the presentation of a petition to wind up a "company is a fraudulent preference, inasmuch as the right "of set-off continues in bankruptcy, but not in winding-up." I think that in that headnote the words " such a set-off " should be followed by the words " where one of the debts

(1) [1893] 3 Ch. 95.

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"is a debt for calls". That case does not therefore apply here at all. All it decided was that a set-off within three months before winding-up may be a fraudulent preference where one of the debts was a debt for a call on shares. The only point I have to consider is whether in this case there was any mutual set-off or position in which there should have been a set-off. Looking at these accounts, I find that there never was any set-off, and I do not think that there was really a position in which any attempt was made to treat what was done as a set-off. I do not say that they could not have been set-off if the right proceedings had been followed. Mr. Berkeley admits that the liquidator would have had to submit to this deduction in a case where there was an actual set-off ; but I find as a fact that there never has been a set-off or any position in which there should have been a set-off. In those circumstances I can only treat the respondents as liable to repay the whole sums, treating the whole proceeding as being a fraudulent preference. Therefore I will make a declaration in the last words of the summons.

Solicitors for the liquidator : *William A. Crump & Son.*

Solicitors for the respondents : *Smith, Rundell, Dods & Bockett.*

E. K. C.

In re "C."

In re THE ADOPTION OF CHILDREN ACT, 1926.

LUXMOORE
J.
1937
July 26, 28.

[1937. C. 790.]

Adoption—Infant—Application by husband and wife—Infant the wife's daughter—Husband no blood relation to infant—Prohibited degrees of consanguinity—Prohibited degrees of affinity—Right of adoption of one applicant alone—Adoption of Children Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 29), *ss.* 1, 2, 3.

A husband and wife sought to adopt under the Adoption of Children Act, 1926, an infant, the daughter of the wife but no blood relationship of the husband. Both husband and wife were less than twenty-one years older than the infant :—

Held, that the phrase "within the prohibited degrees of "consanguinity" in the proviso to s. 2, sub-s. 1 (*b*), of the Act of 1926, on its proper construction, defined the particular degree of blood relationship between the proposed adopter and the proposed adoptee which must exist in order to confer on the Court the power of relaxing the prohibition contained in the sub-section, and was not limited to the cases where the parties were of opposite sex. The female applicant and the infant were within the degrees of consanguinity, but not the male applicant, and accordingly there was no power to approve of the adoption by the male applicant either alone or jointly with the female applicant. An order could, however, be made for the female applicant alone to adopt the infant.

ORIGINATING SUMMONS.

This was an originating summons issued by a husband and wife (who were both British subjects) seeking to adopt under the provisions of the Adoption of Children Act, 1926, a girl who was an infant and the illegitimate daughter of the wife. It appeared that the applicants were both less than twenty-one years older than the infant, the husband being thirty-nine years of age, his wife thirty-eight, and the infant nineteen.

E. Milner Holland for the applicants. The difficulty in the question before the Court arises under s. 2, sub-s. 1, of the Adoption of Children Act, 1926. (1) The words "within "the prohibited degrees of consanguinity" are extremely important, in fact the whole matter really turns upon the meaning of this phrase. The mother perhaps may not be within the "prohibited degrees of consanguinity," the infant being a female and her own daughter. The wife's husband is of course a person within the specific prohibition of the law against marrying the proposed adoptee, though he has no relationship at all. It is really a question of whether the expression "within the prohibited degrees of consanguinity" can be taken to mean the whole of the prohibited degrees relating to marriage, or whether it is consanguinity only and not affinity. The only reference to sex in the Act is contained in s. 2, sub-s. 2, and, it is submitted, does not assist the Court. (2) It is a fact that the relationships in respect of which the law prohibits marriage are always referred to throughout the statutes which have dealt with this as prohibited degrees of relationship.

Where there are Acts prohibiting marriage between persons related in a particular manner to one another, they are only contemplating persons of opposite sexes. The Act of 1926 does not necessarily contemplate, it is submitted, that the parties must be of opposite sexes.

[He cited the Act of 1540 (32 Hen. 8, c. 38), which referred to Levitical degrees.] The Levitical degrees did include degrees of affinity within which marriage was not allowed.

(1) Adoption of Children Act, 1926, s. 2, sub-s. 1: "An adoption order shall not be made in "any case where—

"(*a*) the applicant is under "the age of twenty-five years, "or

"(*b*) the applicant is less than "twenty-one years older than "the infant in respect of whom "the application is made:

"Provided that, where the "applicant and the infant are "within the prohibited degrees of "consanguinity, it shall be lawful "for the court, if it thinks fit, to "make the order notwithstanding "that the applicant is less than "twenty-one years older than the "infant."

(2) Sect. 2, sub-s. 2: "An "adoption order shall not be made "in any case where the sole "applicant is a male and the "infant in respect of whom the "application is made is a female "unless the Court is satisfied that "there are special circumstances "which justify as an exceptional "measure the making of an "adoption order."

In 1835 the Marriage Act (5 & 6 Will. 4, c. 54) made future marriages between persons of the prohibited degrees void. Formerly it could only be dealt with under the Canon Law except in cases of incest. The words in this Act of 1835 were "persons "within the prohibited degrees of consanguinity or affinity." As to the use of the word "degrees," see the Act of 1907 (the Deceased Wife's Sister's Marriage Act) and the Act of 1921 (the Deceased Brother's Widow's Marriage Act). Both this and the previous Act of 1907 can be cited together as the Marriage (Prohibited Degrees of Relationship) Acts, 1907 and 1921. See also the Marriage (Prohibited Degrees of Relationship) Act, 1931, which may be cited together with the earlier Acts. For the purposes of the construction of the Act of 1926, see also s. 5.

The fact that here it is a case of illegitimacy is of course not material, it makes no difference to the fact of it being a prohibited degree.

Regarding the Act of 1926, it would be absurd, it is submitted, if the effect of the words "within the prohibited "degrees of consanguinity" meant only persons who may not marry one another; it would mean that the mother of an illegitimate child who was less than twenty-one years older than the child could be allowed to adopt it if it was a son but not if it was a daughter. The expression means within the degrees of consanguinity of persons who cannot marry.

Another question to be considered is whether the husband can be a joint adopter. He is as the husband of the child's mother within the prohibited degrees of affinity but not within the prohibited degrees of consanguinity taken by themselves. If the words are taken literally, it must only apply to persons who are consanguineous.

A. Andrewes Uthwatt for the Attorney-General. Taking the proviso to s. 2, sub-s. 1 (*b*), of the Act of 1926, it is clear that the object is that where both adopter and adoptee are in the same family the judge is given a discretion whether to insist on the difference in age. The proviso cannot—by reason of the words "within the prohibited degrees of con-"sanguinity"—be construed to mean that a mother may adopt her own son and not her daughter. The degree of consanguinity between the persons with respect to whom the Act is to apply is the only material consideration. The words "male" or "female" do not appear in the Act.

[LUXMOORE J. There is nothing in the Act which says (in the case of joint applications by husband and wife) that the proposed adoptee must be within the prohibited degrees of consanguinity of both applicants.]

Not in terms. There is no express provision for the joint application except in s. 1, sub-s. 3. The prohibited degrees of consanguinity should be read as meaning the prohibited degrees of consanguinity and not affinity. The whole frame of s. 2 of the Act of 1926 really contemplates single applicants.

E. Milner Holland in reply.

LUXMOORE J. In this case the applicants are husband and wife, and they seek to adopt under the provisions of the Adoption of Children Act, 1926, a girl aged nineteen who is the illegitimate daughter of the wife. There is no blood relationship to the husband. The husband and wife are each less than twenty-one years older than the infant.

The matter came before me in Chambers when the Official Solicitor appearing on behalf of the infant submitted that on the true construction of the Act no order could be made, either for a joint adoption by the husband and the wife or for adoption by the wife alone, but he argued however that an order for adoption could be made in favour of the husband alone. He informed me that similar cases had been dealt with in Chambers in this manner. This result appeared to be so curious and capricious that I thought it advisable that the question of the construction of the Act should be argued in open Court. Having regard to the importance of the questions from the public point of view, I requested the Official Solicitor to communicate with the Treasury Solicitor in order that the Attorney-General might be represented at the hearing. I have had the benefit of argument by Mr. Milner Holland on behalf of the applicants, and Mr. Andrewes-Uthwatt representing the Attorney-General.

By s. 1 of the Adoption of Children Act, 1926, the Court is empowered to make an order authorizing the adoption of an infant who has never been married upon the application of any person desirous of being authorized to adopt that infant. By sub-s. 3 of the same section the application for an adoption order may be made by two spouses jointly but, except in that case, no order for adoption can be made authorizing more than one person to adopt an infant. By s. 2 of the Act restrictions are placed on the making of adoption orders. Sub-s. 1 of that section is in these terms: "An adoption "order shall not be made in any case where—(*a*) the applicant "is under the age of twenty-five years, or (*b*) the applicant "is less than twenty-one years older than the infant in respect "of whom the application is made." These restrictions are universal, except in cases falling within the proviso to the sub-section. The proviso is as follows: "Provided that, "where the applicant and the infant are within the prohibited "degrees of consanguinity, it shall be lawful for the court, "if it thinks fit, to make the order notwithstanding that the "applicant is less than twenty-one years older than the infant."

The answer to the questions which have arisen in this case depend on the true construction of the phrase "within the "prohibited degrees of consanguinity." Ought that phrase to be construed as synonymous with the phrase "within the "prohibited degrees of marriage" or as meaning within those degrees of blood relationship which are to be ascertained by reference to the tables of consanguinity. If the former view is correct, the Court cannot authorize the adoption by the parent of an illegitimate infant child who is less than twenty-one years younger than the parent, if the child and the parent are of the same sex, while the Court is free so to do if they are of the opposite sex. The Court is also free in the same circumstances to authorize an adoption by the husband or wife of the parent, provided the infant is of the opposite sex to the husband or wife, as the case may be. It is to be observed that the phrase used is "within the prohibited "degrees of consanguinity," and no mention is made of the prohibited degrees of affinity, and there is no reference in the sub-section to sex. The prohibited degrees of marriage include the prohibited degrees of consanguinity as well as those of affinity. This appears from the Succession Act, 1533–34 (25 Hen. 8, c. 22), taken from the statutes at large. Sect. 3 of that Act contains a recital in these terms: "And "furthermore, since many inconveniences have fallen, as well "within this realm as in others, by reason of marrying within "the degrees of marriage prohibited by God's laws, that is to "say, the son to marry the mother, or the stepmother, the "brother the sister, the father his son's daughter, or his "daughter's daughter, or the son to marry the daughter of "his father procreate and born by his stepmother, or the "son to marry his aunt, being his father's or mother's sister, "or to marry his uncle's wife, or the father to marry his son's "wife, or the brother to marry his brother's wife, or any "man to marry his wife's daughter, or his wife's son's daughter, "or his wife's daughter's daughter, or his wife's sister; which "marriages, albeit they be plainly prohibited and detested "by the laws of God, yet nevertheless, at sometimes they have "proceeded under colours of dispensations by man's power, "which is but usurped, and of right ought not to be granted, "admitted nor allowed; . . . ." Sect. 4 of the Act says: "No person or persons . . . . shall from henceforth marry "within the said degrees afore rehearsed, what pretence "soever shall be made to the contrary thereof; . . . ." In the Act of 1540 (32 Hen. 8, c. 38) the prohibited degrees of marriage are referred to as the Levitical degrees, while in the Marriage Act of 1835 (5 & 6 Will. 4, c. 54) the distinction between the prohibited degrees of consanguinity and affinity are clearly emphasized. The preamble to that Act recites: "Whereas marriages between persons within the prohibited "degrees are voidable only by sentence of the Ecclesiastical "Court pronounced during the lifetime of both the parties "thereto, and it is unreasonable that the state and condition "of the children of marriages between persons within the "prohibited degrees of affinity should remain unsettled during "so long a period, and it is fitting that all marriages which "may hereafter be celebrated between persons within the "prohibited degrees of consanguinity or affinity should be "ipso facto void, and not merely voidable; Be it therefore "enacted by the King's most Excellent Majesty, by and with "the advice and consent of the Lords Spiritual and Temporal, "and Commons, in this present Parliament assembled, and "by the authority of the same, that all marriages which shall "have been celebrated before the passing of this Act between "persons being within the prohibited degrees of affinity shall "not hereafter be annulled for that cause by any sentence of "the Ecclesiastical Court, unless pronounced in a suit which "shall be depending at the time of the passing of this Act; "Provided that nothing hereinbefore enacted shall affect "marriages between persons being within the prohibited "degrees of consanguinity." Sect. 2 provides: "All marriages "which shall hereafter be celebrated between persons within "the prohibited degrees of consanguinity or affinity shall be "absolutely null and void to all intents and purposes whatsoever." "Consanguinity" is defined in the Imperial Dictionary as, "the relation of persons by blood; the relation "or connection of persons descended from the same stock or "common ancestor, in distinction to affinity or relation by "marriage."

A consideration of the tables of consanguinity and affinity shows that the prohibited degrees of consanguinity include all lineals in the direct line, ascendant or descendant, however far asunder in degree; and all collaterals to the third degree inclusive. I can see no reason for reading the words in the proviso to s. 2, sub-s. 1, of the Act of 1926 as if they included prohibited degrees of affinity, nor can I see any ground for introducing any question of sex into the proviso. The prohibited degrees of consanguinity are settled by reference to the degrees of blood relationship, and provided the infant to be adopted is within those degrees, the Court has power to authorize the adoption.

I can see no reason for importing any limitation as to sex in reference to the degrees of consanguinity by reason of the use of the word "prohibited." In my judgment, the phrase "within the prohibited degrees of consanguinity" on its

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"C.," *In re.* THE ADOPTION OF CHILDREN ACT, 1926.

proper construction defines the particular degrees of blood relationship between the proposed adopter and the infant proposed to be adopted, which must exist in order to confer on the Court the power of relaxing the prohibition contained in the sub-section, and is not limited to the cases where the parties are of opposite sex.

The female applicant and the infant are within the degrees of consanguinity thus defined. The male adopter is not within any degree of consanguinity with the infant, although he is in a similar degree of affinity. Since the proviso is confined to degrees of consanguinity, the power of the Court to authorize the adoption is limited to the case of the female applicant. The Court has no power to approve an adoption by the male applicant, either alone or jointly with the female applicant. The male applicant consents to the adoption of the infant by the female applicant alone, and as the requirements of s. 2, sub-s. 4, of the Act of 1926 are thus satisfied, I authorize therefore the adoption of the infant by her mother alone.

Solicitors: *Official Solicitor; Treasury Solicitor.*

A. R. LL.-T.

WOOLWICH EQUITABLE BUILDING SOCIETY *v.* PRESTON.

CLAUSON J.

1937
Nov. 3.

[1937. W. 1656.]

Mortgage to building society—Attornment clause in mortgage reserving nominal rent—Power to distrain ineffective—Proviso in attornment clause for re-entry and taking possession on default in instalments—Proceedings to obtain possession—Tenancy created by attornment terminated by claim for possession.

In a mortgage to a building society, power to distrain arising from an attornment clause reserving merely a nominal rent has no practical value.

A proviso, in an attornment clause under which the mortgagor becomes tenant from year to year, that the society, after its power of sale has arisen, may terminate the yearly tenancy created by the clause by re-entering and taking possession without notice to the borrower, does not make re-entry and taking possession the only means, other than the giving of six months' notice, by which the society can terminate the tenancy. Proceedings in Court by the society for possession are tantamount to re-entry and taking possession. Therefore, on the taking of proceedings, the yearly tenancy becomes a tenancy at will, terminated by the claim for possession.

Moore v. *Ullcoats Mining Co., Ld.* [1908] 1 Ch. 575 followed.
In re Threlfall (1880) 16 Ch. D. 274 considered and distinguished.

ORIGINATING SUMMONS.

By this summons the society asked that the defendant might be ordered to give possession to it of premises comprised in a mortgage and further charge both dated December 29, 1936, and made between the defendant and the society, and asked also that the defendant might be ordered to pay to it the sum of 13*l.* 15*s.* 3*d.*, subscriptions due and payable by the defendant to the society under the mortgage and further charge at the rate of 3*l.* 7*s.* per month.

By the mortgage and further charge the defendant demised the dwelling-house and premises therein comprised to the society by way of mortgage, in consideration of the sums of 470*l.* and 66*l.* respectively advanced to him, and thereby covenanted to repay to the society the sums of 470*l.* and 66*l.* respectively

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by instalments of 2*l*. 18*s*. 9*d*. and 8*s*. 3*d*. respectively per calendar month pursuant to the society's rules.

Clause 2 of the mortgage provided: ". . . . if the mortgagor shall duly and punctually pay to the society all the ". . . . moneys herein covenanted to be paid by the mortgagor "to the society and shall observe and perform all the covenants "on his part herein contained then this security shall be "vacated by a receipt pursuant to the statutes in that behalf "and the rules for the time being of the society."

Clause 3 provided ". . . . At any time before this security "shall have been vacated or redeemed as aforesaid the society "may without any further consent on the part of the mortgagor ". . . . sell the mortgaged property or any part thereof. "Provided Always that the society shall not exercise any of "the foregoing powers unless and until (*a*) default shall have "been made by the mortgagor in payment of some instalment "or fine or other money herein covenanted to be paid by him; ". . . ."

Clause 6 provided: "The mortgagor hereby attorns and "becomes tenant from year to year to the society of such part "or parts of the mortgaged property as are in the occupation "of the mortgagor at the yearly rent of sixpence if demanded. "Provided Always that the society may at any time after the "power of sale hereby conferred shall have become exercisable "and without giving to the mortgagor any previous notice "to quit enter upon and take possession of the mortgaged "property whereof the mortgagor has attorned tenant as "aforesaid and determine the tenancy created by such "attornment. And that neither the receipt of the said rent "nor the tenancy created by the said attornment shall render "the society liable to account as mortgagee in possession."

The defendant defaulted, and did not pay to the society the instalment for February, 1937, covenanted to be paid by him under the mortgage. The society issued this summons on May 14, 1937.

The defendant was not represented and did not appear.

R. J. Sutcliffe for the society. Although the defendant is not represented and does not appear, a suggestion is apparently made that, as, on the true construction of the attornment clause, there is a yearly tenancy, there must, if that tenancy is to be determined otherwise than by six months' notice, be compliance with the proviso to the attornment clause, and that, as there has not been that compliance, the tenancy has not been determined. It is clear from *Moore* v. *Ullcoats Mining Co., Ld.* (1), that the taking of proceedings is equivalent to entering into possession, and that the society is entitled to the order for which it asks.

CLAUSON J. The point is a curious one, coming before me on the adjournment of the summons into Court by the Master. The attornment clause in the mortgage is a clause which has been in use for many years past. It will be observed that the yearly rent reserved is sixpence. The clause, some years ago, was usual in a form which mentioned a substantial rent and, where it took that form, it had considerable virtue in that it gave the mortgagee the right to distrain against the mortgagor. For reasons connected with the legislation as to Bills of Sale the practice of reserving a substantial rent ceased to be usual, and the subsequent practice has been to reserve only a nominal rent, with the result that the power of distress created by the clause has become valueless.

A similar clause came before the Court in *In re Threlfall* (2), and it was there determined that, until the mortgagee enters into possession in accordance with the proviso, the tenancy from year to year continues. It has sometimes been supposed that that case decided that the tenancy from year to year will continue until determined by proper notice to quit or by actual re-entry and taking possession; but that view of the matter disregards the point that, in the eye of the law, the issue of proceedings claiming possession simpliciter has precisely the same effect as re-entry and, accordingly, turns the tenancy into a tenancy at will, while either the issue or, at all events, the service of the summons on the person in

(1) [1908] 1 Ch. 575. (2) 16 Ch. D. 274.

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possession under the tenancy terminates the tenancy at will; and, accordingly, where the proceeding is a summons in Chambers in the Chancery Division, as soon as the summons is issued, the applicant is deemed to have re-entered and the tenancy becomes a tenancy at will, and (at latest) as soon as the summons is served, the tenancy at will is determined by the claim for possession. Therefore it is not necessary for the applicant to prove that he has given a notice to quit determining the tenancy: he is entitled to an order for possession (unless, on the merits of the case, there is some good reason to withhold the order from him) upon proving service of the summons.

Accordingly, in the present case the society is entitled to its order for possession. The effect of the issue of the summons as being the equivalent of re-entry is shown by the language of Warrington J. in *Moore* v. *Ullcoats Mining Co., Ld.* (1), a case which was not drawn to the Master's attention.

I will make an order in the usual form for possession. It will contain nothing about costs, as it is not the practice to give costs in a claim for possession.

Solicitor: *A. E. Shrimpton.*

(1) [1908] 1 Ch. 575.

K. R. A. H.

In re DRAKE'S SETTLEMENT TRUSTS.

WILSON *v.* DRAKE.

[1936. D. 71.]

C. A.

1937

Oct. 20, 21.

Revenue—Succession Duty—" Predecessor "—Time for ascertaining predecessor—Joint predecessors—Succession Duty Act, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 1, 2, 13.

The time for ascertaining the predecessor or predecessors from whom a successor derives his succession for the purposes of the Succession Duty Act, 1853, is the time when the disposition is made creating the succession and not the time when the succession falls into possession.

Under the will of a testator A. was entitled to property for an estate in fee simple in remainder expectant upon the death of a tenant for life but defeasible if A. failed to survive a certain date, in which event B. would become absolutely entitled to an estate in fee simple. Before that date had arrived, A. and B. agreed to settle the property upon certain trusts and afterwards joined in making a settlement accordingly. In the events which happened the contingency on which A.'s interest would cease and B. would become entitled never took place:—

Held, that a successor under the agreement and settlement derived his succession from both A. and B. as predecessors, and, as the proportional interest derived from each predecessor was at the critical time not distinguishable, the successor must, pursuant to s. 13 of the Succession Duty Act, 1853, be deemed to have derived his succession in equal proportions from A. and B.

APPEAL from Bennett J.

At the date of a disentailing deed dated April 28, 1910, Herbert William Tyrwhitt Drake (hereafter called "the testator") was entitled to the freehold properties constituting the Drake settled estates and situate in the counties of Buckingham, Hertford, Lincoln, Chester, Oxford, Kent, Somerset and London for an estate in tail male in remainder expectant on the death of his father, William Wykeham Tyrwhitt Drake (who was tenant for life in possession), and subject to certain prior charges or incumbrances, which had since determined or were discharged, under a settlement dated July 31, 1874.

On April 28, 1910, the testator, with the consent of his father as protector of the settlement, executed a disentailing deed in regard to the Drake settled estates and conveyed them, subject to his father's life interest, as to certain property formerly in Kent and then in the administrative county of London (called the "Deptford estates"), to the use of trustees for a term of 1000 years to commence from the death of the said William W. T. Drake and be held upon trusts thereinafter described, and as to all other the said settled estates, and also the Deptford estates from and after the expiration or determination of the said term of years, to the use of the testator and his heirs for ever. And it was declared that the term of 1000 years was to be held in trust, if there should be any younger child or children of the said William W. T. Drake, who being male attained the age of twenty-one years or being female attained that age or married, to raise by mortgage of the Deptford estates or any part thereof in any manner therein mentioned such sum of money for the portion of each of the younger children as the said William W. T. Drake should appoint, but so that no sum exceeding 15,000*l.* should be appointed to or raised for the portion of any one of such younger children.

By deed poll dated April 29, 1910, the said William W. T. Drake, in exercise of the power conferred on him by the disentailing deed, appointed to Edward Thomas Tyrwhitt Drake (a younger child who is hereafter referred to as Edward) if he should attain the age of twenty-one years the sum of 15,000*l.*, but subject to a power of revocation.

By his will dated March 11, 1915, the testator, after appointing executors and trustees, devised and bequeathed all his real and personal property (except the legacies thereinafter mentioned) unto his brother Edward absolutely should he survive the dangers of the then present war, in which he was engaged; and the testator declared that for the purpose of that trust the war should not be considered as determined until the final terms of peace had been signed; but if Edward should not survive the war, but should die before the termination thereof as thereinbefore defined, then the trust property should from and after the decease of the survivor of the testator and Edward be held for the purposes of raising and paying thereout an annuity or rentcharge of 1200*l.* to the widow of

Edward, to whom the testator gave and bequeathed the same accordingly, such annuity to commence from the death of her husband, and subject thereto and charged therewith and subject also to the said legacies the ultimate residue of the trust property was to be held in trust for the testator's uncle Guy Percival Drake (therein referred to as Percy Tyrwhitt Drake and hereafter called Percy) absolutely.

The testator died on March 11, 1915, and his will was proved on April 15, 1915, by the executors therein named.

By an agreement (hereinafter called "the 1917 agreement") dated February 15, 1917, and made between Edward of the first part, Percy of the second part, the defendant Venice Tyrwhitt Drake, wife of Edward, of the third part, and Charles James Phillips and Frederick Stanley Parker of the fourth part, after a recital that it had been agreed between the parties thereto that notwithstanding anything in the will of the testator the hereditaments therein comprised should be settled in manner thereafter set out it was agreed (clause 1) that so soon as might be a settlement should be executed settling the property set out in the schedule thereto (which included such of the Drake settled estates as were situate in the counties of Buckingham and Lincoln and the Deptford estates) subject to the life estate of W. W. T. Drake and the said term of 1000 years affecting the Deptford estates; (clause 2) that the said hereditaments should be settled in manner thereinafter indicated.

Sub-clause (*a*) provided that the first trustees of the settlement should be the parties of the fourth part, or, if they or either of them refused office, such persons as Edward or his legal personal representatives should nominate for the purpose.

Sub-clause (*b*) directed that the settlement should contain a declaration binding the trustees for the time being of the said term of 1000 years to raise the sum of 10,000*l.* part of the sum of 15,000*l.* appointed in favour of Edward whether the appointment should have been revoked or not and to pay the said sum of 10,000*l.* and interest to Percy at such time and in such manner as if the sum of 10,000*l.* had been assigned by Edward to Percy absolutely.

Sub-clause (*c*) provided that subject to the limitation of a term of years upon the trusts thereinafter mentioned the hereditaments should be limited to the use of Edward for life.

Sub-clause (*d*) gave Edward power to appoint to his present or any other wife a yearly rentcharge of 1000*l*. from his death for the residue of her life for her jointure.

Sub-clause (*e*) conferred power on Edward to appoint portions for his younger children.

Sub-clause (*f*) provided that after the determination of the life estate of Edward and subject to the provisions for jointure and portions the hereditaments should be limited to the use of the first and other sons of Edward successively according to seniority in tail male with remainder to the use of Percy for life with remainder to the use of his first and other sons successively according to seniority in tail male with divers remainders over.

Clause 5 of the agreement provided that the settlement should contain a declaration exonerating the estate known as the Cheshire estate, the contingent interest therein of Percy being released to Edward by deed of even date, from the charges created or to be created by virtue of the term of 1000 years.

Clause 6 provided for the release by Mrs. Venice T. Drake of the contingent annuity of 1200*l*. given to her by the will of the testator.

Clause 7 provided that on the completion of the settlement Edward should assign to Percy absolutely the said sum of 10,000*l*.

William W. T. Drake died on July 29, 1919, without having revoked the appointment to Edward. As the result of proceedings by Edward against Percy for specific performance of the 1917 agreement a settlement giving effect to the agreement was made on March 21, 1921.

In this settlement Edward and Percy conveyed " as settlors "according to their respective interests." By a conveyance of even date and in order to give further effect to the agreement Percy conveyed and released his interest in the Cheshire estate to Edward in fee simple subject as therein mentioned, and Mrs. V. T. Drake released the Cheshire estate from the annuity of 1200*l.* given to her by the will of the testator.

Percy died on June 24, 1928. Edward was married to one wife only, the defendant Venice T. Drake, and there were issue of the marriage four daughters only—namely, the defendants Diana T. Drake, Joan T. Drake, Delia T. Drake and Barbara T. Drake, all of whom were infants and unmarried. He died on August 31, 1933, having by his will, dated June 15, 1933, exercised the power conferred by the 1921 settlement by appointing portions to his four daughters. On the death of Edward the defendant Thomas Tyrwhitt Drake, who was the eldest son of Percy, became tenant in tail in possession under the settlement subject to the existing family charges, and, vesting assents having been made in his favour, he executed a disentailing deed on January 3, 1934, enlarging his estate tail into an estate in fee simple.

On January 13, 1936, a summons was taken out asking whether Edward was to be deemed the predecessor from whom the interests of the defendants Thomas T. Drake, Venice T. Drake and her four infant children were derived within the meaning of s. 2 of the Succession Duty Act, 1853 (1), or whether Edward and Percy were to be deemed joint predecessors under the provisions of s. 13 of the said Act (1) from whom such interests were derived.

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(1) The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), provides :—

Sect. 1 : "In the construction "and for the purposes of this "'Act, ... The term 'succession' "shall denote any property "chargeable with duty under this "Act."

Sect. 2 : "Every past or future "disposition of property, by reason "whereof any person has or shall "become beneficially entitled to "any property or the income "thereof upon the death of any "person dying after the time "appointed for the commencement of this Act, either im"mediately or after any interval, "either certainly or contingently, "and either originally or by way of "substitutive limitation, and every "devolution by law of any bene"ficial interest in property or the "income thereof, upon the death "of any person dying after the "time appointed for the com"mencement of this Act, to any "other person, in possession or "expectancy, shall be deemed to "have conferred or to confer on "the person entitled by reason of "any such disposition or devolu"tion a 'succession'; and the term "'successor' shall denote the "person so entitled ; and the term "'predecessor' shall denote the "settlor, disponer, testator, obli"gor, ancestor, or other person "from whom the interest of the "successor is or shall be derived."

By an affidavit of Charles J. Phillips filed in the specific performance action he stated that shortly after the testator's death in 1915 he was requested by Percy to see Edward's solicitor in consequence of a suggestion by Edward's solicitor that Percy should release his contingent interest in the property bequeathed by the testator, and the price offered was 2000*l.* The offer was thought totally inadequate, and as a result of negotiation the agreement of 1917 was concluded. In the present proceedings an affidavit of Robert L. Hunter, the senior partner of Messrs. Hunters, the firm acting as solicitors for Percy in the negotiation of the 1917 agreement, was filed by which he stated, after referring to Edward's original offer, that Percy held strong views as to the descent of estates in the male line and was anxious that the Drake settled estates should continue to be held by a male member of the family. He did not expect Edward to die without having a son, nor did he expect to receive any money payment himself. Mr. Hunter said that he was instructed to say that his client was not prepared to accept any money payment for the release of his contingent interest. The question of a money payment was only reintroduced when it was suggested that the Cheshire property should be excluded from the settlement, and so far as there was any element of sale in the transaction it was a sale to Edward of Percy's contingent interest in the Cheshire property.

The summons was heard before Bennett J. on November 4, 5 and 6, and judgment was delivered on December 21, 1936.

BENNETT J. said that it was contended that although Edward and Percy were both conveying parties in the settlement of 1921, yet that instrument ought to be considered as the settlement of Edward alone, as the negotiations that ended in the agreement of February 15, 1917, really ended in the purchase by him of Percy's contingent interest for a sum of 10,000*l.* In his judgment the facts did not point in that direction. If that had been the true transaction, Percy and his issue would hardly have been placed before Edward's female issue.

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(1) Sect. 13: "Where the successor "shall derive his succession from "more predecessors than one, and "the proportional interest derived "from each of them shall not be "distinguishable, it shall be lawful "for the commissioners to agree "with the successor as to the duty "payable; but if no such agree"ment shall be made, the succes"sor shall be deemed to have "derived his succession in equal "proportions from each predeces"sor, and shall be chargeable with "duty accordingly."

He was, however, still of opinion that Edward was the sole predecessor having regard to the principle laid down in *Lord Braybrooke* v. *Attorney-General* (1); *Attorney-General* v. *Floyer* (2); and *Attorney-General* v. *Smythe* (3) to the effect that the question was out of whose estate the successors derived their respective interests. To this question there could, in his judgment, be but one answer, seeing that if Edward had not been a party to the settlement none of the defendants Thomas T. Drake, Mrs. Venice T. Drake and her infant children would, in the events which happened, have taken any interest in the settled property, while if Percy had not been a party to the settlement the interests of these defendants would have been the same as they were now. For these reasons he decided that Edward was the sole predecessor.

The defendant Thomas T. Drake appealed. The appeal was heard on October 20 and 21, 1937.

Latter K.C. and *T. K. Wigan* for the appellant. For the purpose of succession duty Edward and his uncle Percy were joint predecessors of the appellant and of the four children of Edward in respect of their portions in view of the agreement of 1917 and the settlement made in 1921 to give effect to it. The Succession Duty Act, 1853, s. 1, defines a "succession" as denoting any property chargeable with duty under the Act, and s. 2 shows what it is that confers a succession. Thus a succession is conferred by reason of a disposition and not by reason of the death of persons enjoying prior interests, and in this case it is therefore necessary to look

(1) (1860–1) 9 H. L. C. 150.
(2) (1862) 9 H. L. C. 477.
(3) (1862) 9 H. L. C. 497.

back to the agreement of 1917. The liability to duty attaches at once and it is only the payment of the duty that is delayed till the interest created by the disposition falls into possession: see s. 20. It is s. 13 which applies here as dealing with the case where a successor derives a succession from more than one predecessor. Here Edward and his uncle both had contingent interests, and it was only by their joining together in 1917 that the successions in question were created. It is not a case where each settled his interest but they combined to settle an absolute interest. It is true that, as Edward survived the war, his interest became absolute; but that cannot affect the question of who were the predecessors when the successions were created by the agreement of 1917.

There were two arguments against this view before Bennett J. First it was said that Edward bought out his uncle by paying 10,000*l.* and that Edward alone was therefore the predecessor. That argument was not accepted by Bennett J. The second argument was that because, in the events which happened, Edward survived the war and took an absolute interest, he alone was the predecessor. This argument prevailed in the Court below; but as already pointed out it errs in not taking into account that the disposition was made in 1917 and that it is therefore to that date that one must look to ascertain the predecessors. Thereafter there could be no variation in the rate of duty. Thus the succession is fixed under s. 2 of the Act by the execution of the document creating the disposition and the successor is the person thereby entitled. That document is treated as conferring a succession, if it confers a right to property on a death, and under s. 1 it is the succession that is charged with duty. Predecessor means the person from whom the interest in property is derived, and therefore the liability to duty is fixed at the date of the disposition creating the succession. The term "predecessor" is used without regard to the fact that the interest is not then vested in possession. Authorities bearing this view out are *Lord Advocate* v. *Macalister* (1); *Lord Wolverton* v. *Attorney-General* (2); *Duke of Northumberland* v.

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(1) [1924] A. C. 586, 589.

(2) [1898] A. C. 535, 542, 547.

Attorney-General (1); and *Attorney-General* v. *Belilios.* (2) There were also cases in which a tenant for life and the remainderman joined in an appointment, and it was held that the tenant for life was not a predecessor, as he had no interest to transfer after his death. Bennett J. should not have treated that type of case as affecting the position here. Those cases are *Attorney-General* v. *Sibthorp* (3), which was reviewed in *Lord Braybrooke* v. *Attorney-General* (4), and *Attorney-General* v. *Floyer.* (5)

In *Floyer* v. *Bankes* (6) it was made clear that it is the original position at the time of the disposition to which regard must be had; and when this is done it is clear that Edward could not have conferred an absolute interest in 1917, for his own interest was then a contingent interest only. Regard must be had to the substance of the matter, and neither Edward nor his uncle Percy could by himself have created an absolute interest.

[They also referred to *Attorney-General* v. *Baker.* (7)]

Spens K.C. and *J. V. Nesbitt* for Edward's widow and four children. It is to the interest of these defendants to say that Edward is the only predecessor. This is not disputed so far as regards the widow, for her annuity was clearly derived from Edward alone. The four children's liability to duty arises in regard to the portions appointed to them under a power conferred by the settlement in 1921 made pursuant to the agreement of 1917, and the material date for consideration is admittedly that of the 1917 agreement. The fact that the portions arose upon the exercise of a power of appointment does not assist these defendants' case. Some reliance might be placed on the fact that at the time of the 1921 settlement Edward had an absolute interest, as he had then survived the war; but in the Court below it was agreed that the 1917 agreement was the material document to be considered. It is denied, however, that the succession and the rate of duty to become payable are determined at the date of the disposition creating the succession. It is quite obvious that there may be alternative successors who would have to pay different rates of duty, as, for example, when there is a settlement by A. on himself for life with remainder to his children, and in default of children to a stranger in blood. It entirely depends on after events what rate of duty is payable. Just as there are alternative successors in such a case so there can be alternative predecessors. If Edward and his uncle Percy had each settled his interest by a separate document, the succession from Edward would, in the events which happened, alone have taken effect. The uncle had in the events which happened nothing to settle. It can make no difference that they joined in one deed to make the settlement.

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(1) [1905] A. C. 406, 409.

(2) [1928] 1 K. B. 798, 822, 825.

(3) (1858) 3 H. & N. 424.

(4) 9 H. L. C. 150.

(5) 9 H. L. C. 477.

(6) (1863) 3 De G. J. & S. 306.

(7) (1859) 4 H. & N. 19.

[SIR WILFRID GREENE M.R. There is a marked difference between separate settlements of different interests and a joint settlement of a single interest.]

In fact each settlor was only conveying what he had. It is when the interest of the successor vests in possession that the question arises who is the predecessor, and it is clear then that it is Edward alone. This is not a case where s. 13 can apply. Further, if there were two predecessors, it would be possible to distinguish the proportion of the succession attributable to each predecessor. It is only when it is impossible to arrive at a due proportion that s. 13 applies to cause the succession to be treated for purpose of duty as attributable to the two predecessors in equal shares. Regard must be had by the Court to the substance of the transaction: *Attorney-General* v. *Maule.* (1)

Next it is contended that Edward was the sole predecessor, because the 1917 agreement shows that he paid 10,000*l.* to his uncle as consideration for his settling his contingent interest. It is well settled in such a case that the person who makes the disposition is the person paying the consideration. The evidence makes it clear that this was the position in the present case.

[ROMER L.J. It may well be that the 10,000*l.* was paid to obtain a release of the Cheshire estate for the benefit of Edward only.]

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(1) (1887) 56 L. T. 611, 613.

J. H. Stamp for the Attorney-General. On the construction of the will of the testator Edward took not a contingent interest but a vested interest subject to being divested in certain circumstances. But, however that may be, the vital question is at what stage s. 13 of the Succession Duty Act, 1853, becomes applicable. A succession is defined as property chargeable with duty under this Act, and s. 13 applies when a successor derives property subject to duty from more predecessors than one, and it is contended therefore that s. 13 only comes into operation when the time comes to see what duty is payable, that is, when the successor comes into possession of the property charged with duty under s. 2. That is the date when the duty has to be ascertained.

[SIR WILFRID GREENE M.R. Why do you say this is the only relevant date under s. 13? There is power to commute duty at an earlier date.]

It is true that s. 39 gives power to compound duty. For s. 13 to apply the Court has to find more than one predecessor contributing an element to the succession, and it is only if it is impossible to distinguish the share contributed that two predecessors are treated as sharing equally in creating the succession. It is beyond question here that each of the alleged predecessors in this case made a disposition in 1921 to the extent of his interest in the property settled, so that the proportion of the succession attributable to each is known. The sort of case when s. 13 applies is when damages are awarded to a parent and child together and they join in settling them. The contention that the predecessor is ascertained at the time of the disposition is incorrect. Sects. 12, 13, 14 and 15 all deal with difficulties arising in ascertaining the duty payable. When the time comes to pay duty, all that matters is the succession that has become operative. Here it is clear, then, that the succession is derived from Edward alone, who in the events which happened became absolutely entitled to the property settled. There is nothing derived from Percy to be taxed.

Bradley Dyne for the plaintiffs, the trustees of the 1921 settlement.

Latter K.C. replied.

SIR WILFRID GREENE M.R. [after stating the facts:] The question which arises so far as the estate of the present appellant, Percy's son Thomas, is concerned is whether the predecessor for the purpose of the Succession Duty Act was Edward or Edward and Percy together.

It is to be noticed that at the time when Thomas succeeded to his estate in tail male in possession the event which under Herbert's will would have rendered Edward's estate absolute and indefeasible had already happened, and in view of that circumstance it now appears that an equally effective disposition of the estates could have been made if Percy had never been a party to it, because it would have taken effect out of what ultimately became the absolute vested indefeasible estate in fee simple of Edward. The same observation applies to the portions. Edward's estate in the light of after events became an estate sufficient validly, without any assistance from Percy, to charge those portions.

It is convenient at this stage, and in the light of the facts, to summarize in a very concise form the two views which have been presented. On behalf of Thomas—whose interest it is, having regard to his relationship, to attribute his succession, so far as he can do so, to his father, Percy, rather than to his cousin, Edward, because the rate of duty would be different—it is said that for the purpose of the Succession Duty Act there were two predecessors—namely, Edward and Percy—and that the case was one where it was not possible to say what proportionate part of his succession was derived from either. It is said on behalf of the four children of Edward—they, of course, being interested in having it established that their father was predecessor and that their great-uncle, Percy, was not a predecessor, because by that means they get a lower rate of duty—and on behalf of the Crown that the predecessor for the purpose of the Succession Duty Act was Edward and Edward alone. The difference in the rate of duty makes the matter one of substance, and, indeed, it is one of some general importance.

Before I come to explain the arguments in a little more detail, I should refer to the relevant sections of the Succession Duty Act, 1853. The problem which we have to solve is to find out who is the predecessor. Sect. 2 of the Act describes the dispositions and devolutions of property which are to confer successions for the purpose of the Act, and it contains definitions of the terms "successor" and "predecessor." [His Lordship read the section.]

"Succession" is defined in s. 1 of the Act as follows: "The "term 'succession' shall denote any property chargeable with "duty under this Act." And "property" is to include "real "property and personal property." There is one matter to be observed on that section, and indeed it is what may be described as a commonplace of the law relating to succession duty—namely, that a succession comes into existence when it is created. The payment of duty, however, does not fall to be made unless and until the successor becomes entitled in possession to the property which is the subject-matter of the succession, and accordingly there may be a case where a succession is created, which does not lead in the event to any payment of duty, for the reason that under that succession a successor never comes into possession owing to some intervening circumstance. But that does not alter the fact that the succession comes into existence when the disposition is made, and the successor is the person who becomes entitled then under the disposition. Sect. 2 applies not merely to cases of dispositions made after the Act but also to dispositions which were, so to speak, current at the date of the Act, that is, to dispositions which, being made before the Act, did not when made carry these consequences, but automatically fell within the Act immediately it came into operation. The Act coming into operation and being applied to an existing disposition created then and there a succession. I have said that it is a commonplace of the law relating to succession duty that the succession comes into existence at the date of its creation, although the payment of duty is deferred, and if authority is needed for that proposition I need only mention *Lord Advocate*

v. *Macalister* (1) and *Attorney-General* v. *Belilios.* (2) That, however, does not by itself solve the present problem, the nature of which will emerge more clearly in a moment.

The next section of the Act to which I will refer is s. 20, which provides that the duty imposed by the Act is to be "paid at the time when the successor, or any person in his "right or on his behalf, shall become entitled in possession to "his succession, or to the receipt of the income and profits "thereof." That section quite clearly contemplates that the succession had been created previously to the successor coming into possession, that he was entitled to it from the very beginning, but that his liability to duty only arises if and when he becomes entitled in possession. Sect. 10 provides for differential rates of duty according to the relationship between the successor and the predecessor. But the section under which the question really arises is s. 13, which states: "Where the successor shall derive his succession from more "predecessors than one, and the proportional interest derived "from each of them shall not be distinguishable, it shall be "lawful for the commissioners to agree with the successor as "to the duty payable; but if no such agreement shall be "made, the successor shall be deemed to have derived his "succession in equal proportions from each predecessor, and "shall be chargeable with duty accordingly." It is noticeable that the word used in that section in relation to the successor and his succession is the word "derive." That refers back to s. 2, which defines the predecessor as the settlor, or other person from whom the interest of the successor is or shall be derived. The date at which that derivation takes place under s. 2 is quite clearly the date when the disposition is made, and it seems to me that the period of time which is being contemplated by the word "derive" in s. 13 is similarly the date at which the succession was first created.

Pausing there, I will state in a little more detail the contentions which arise. Mr. Latter, on behalf of Thomas, contends that the case falls within s. 13. He says that the successor is Thomas, and, of course, the portioners, but I will

(1) [1924] A. C. 586.

(2) [1928] 1 K. B. 798.

leave them aside for the moment and concentrate on Thomas for the sake of simplicity. He has become entitled in possession to his succession within the meaning of s. 20, and duty is accordingly exigible. From whom did he derive that succession? Mr. Latter says that the answer to that question must be given by reference to the same date as is contemplated by s. 2—namely, the date of the creation of the succession by the disposition which brought it into existence. Mr. Latter then says: "Looking at the matter at the relevant date—namely, "February 15, 1917—from whom could it be said, as at that "date, that Thomas derived his succession? Clearly from "Edward and Percy, because it was only by the joint disposition "of the two of them that Thomas's succession was created." It is then said on behalf of Thomas, still keeping the mind fixed on that date: "Was it then possible to say that the "proportional interest derived from each of those two could "be distinguished?" That question is answered in the negative, because in 1917 it was quite impossible to say whether under Herbert's will Edward or Percy would become absolutely and indefeasibly entitled. Therefore it is said that the proportional interest derived from each of those two was not distinguishable. Mr. Latter says that that is sufficient to establish his case.

On the other hand, it is said that, when the agreement of February 15, 1917, is examined, its true nature and effect is that under it two successions were created—that Edward and Percy, each of them according to the estate and interest which he had at the time, created a succession by the joint effect of which, it is true, Thomas became entitled to an indefeasible estate in tail male in remainder, but that nevertheless there were two successions, each with its appropriate predecessor, and that in the events which happened the successor only became entitled to one of the two successions in possession, that one being, of course, the one derived from Edward, whose estate ultimately became indefeasible. It is said, therefore, that the document of February 15, 1917, must be treated in exactly the same way as if these two men, instead of combining by agreement in one operation, had each of them separately

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and independently and without consultation with the other made a settlement which could only be effective so far as his interest went. And it is said, and I think it is said with truth, although it is not necessary to form a conclusive opinion on the matter, that had those two by entirely independent documents, executed at different times, created successions, that would have been a case of two successions with two predecessors, one only of which would have matured so as to attract duty under s. 20. And it is said that the present case must be treated as though it were exactly on all fours with that case.

If that proposition were correct, I think that the respondents would be entitled to succeed; but in my opinion that proposition involves an artificial and inaccurate way of regarding this transaction. Under the document of February 15, 1917, treating that as being the effective document for the purpose, Thomas became beneficially entitled to property not contingently but certainly. That appears to me to be the plain common sense of the matter, and to say of him that he did not become entitled to his estate in tail male in the Tyrwhitt Drake Estates " certainly " under that disposition but that what he became entitled to were two different estates, one of them an estate which was defeasible if Edward did not survive the war and the other of which was contingent on Edward's not surviving the war, is to say what appears to me to ignore entirely the reality of the situation and the true effect of the deed of February 15, 1917. The estate of Thomas which he acquired by virtue of that disposition was one which could only be acquired by him by the joint disposition of the two; they alone could effectively confer it on him and confer it not contingently but, following the wording of s. 2, " certainly." It was the joint effect of what those two together did in making that joint disposition which, in my opinion, conferred on him " certainly " and not contingently his estate in the settled property. If that be a true analysis of the position, when I look at s. 2 and put the question which requires to be put under that section: At the date of the agreement from whom was the then created interest of Thomas in this property

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derived ? it seems to me impossible to say that the interest which he had at that moment was derived from Edward or from Percy ; it was derived from the joint action of the two of them carried into effect pursuant to an agreement under which they jointly conferred on him the interest which he obtained. It seems to me, therefore, that the persons from whom the interest of Thomas was derived were Edward and Percy Tyrwhitt Drake.

But Mr. Spens and Mr. Stamp meet that argument in some such way as this. They say that, although it may be true that at the date of the instrument the interest which Thomas obtained by it was in effect derived from both Edward and Percy, because at that date it could not be said which of them was the effective disponer, s. 13 is contemplating the problem there envisaged as arising for solution at the date when the payment of duty falls to be made. They contend that it is when the event happens which brings the interest of the successor into possession—in this case the death of Edward—that it has to be ascertained whether his succession was derived from more predecessors than one, and that, as Percy's estate under Herbert's will never vested at all, because the contingency on which it was to pass—Edward's death before the end of the war—never happened, Thomas's estate was derived from Edward and from Edward alone. It is said that this is not really ascertaining ex post facto who the predecessor was, but merely asserting that of two predecessors, each of whom had according to his ability conferred on the successor an interest in the property, only that one becomes relevant to consider whose estate in the event proved to be the estate which effectively produced the interest of the successor.

I am unable to construe s. 13 in that way. It appears to me that the relevant date at which these matters are to be ascertained is the date when the succession is created, which is the moment when the successor "derives" his succession. If I am right in thinking that there was only one succession—namely, Thomas's succession, in respect of the absolute indefeasible estate in tail male in remainder—one succession derived from the joint disposition of two persons—it is in my judgment impossible ex post facto to dissect the transaction of 1917 and treat it as though it were two independent dispositions creating two independent successions. I have said that in my judgment that is entirely artificial and, bearing in mind that the construction of the Succession Duty Act is to be rather what has been described as a popular than a technical one, I am confirmed in my view as to the construction of s. 2 which, if construed in that way, covers this case and treats Thomas as obtaining one succession and one succession only. Directly that is established, it seems to me that s. 13 must be applied in such a way that the predecessor in respect of that succession is to be ascertained at the date when the succession came into existence.

Bennett J. decided in favour of the contention of the respondents to this appeal in reliance on certain authorities which, in point of fact, have not been much relied on by the respondents in this Court, but I must deal with them, because the learned judge made them the foundation of his judgment. Those authorities, of which *Lord Braybrooke* v. *Attorney-General* (1) may be taken as typical, were of this nature. They deal with the case where a father who was tenant for life in possession and his eldest son who was tenant in tail in remainder by the usual family arrangement concurred in a disentailing deed and a resettlement of the estates, under which the father had restored to him his life estate. There was the usual joint power of appointment given to father and son. That is the typical case—there are certain variations on it in the decided cases, but variations which do not affect the substance of the matter. In such a case when the father and the son in exercise of the joint power of appointment proceeded to resettle the estates in such a way that the father got back his original life estate, and the son was given a life estate in remainder, the question arose whether the life estate of the son was to be treated as derived to some extent at any rate from his father's interest. It was argued that the exercise of the joint power of appointment was a matter which made the father and the son joint disponers. It was further argued

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(1) 9 H. L. C. 150.

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that, the entire interest of both of them having been thrown, as it were, into a melting-pot and new interests created out of them, the new interests so created were referable not to the interest of the one but to the interests of the two of them. Thus it was said that the life interest of the son must not be treated as referable entirely to his previous estate tail in remainder.

In those cases the House of Lords held that the exercise of the joint power of appointment could be disregarded as being a mere piece of machinery, and that in effect the life interest of the son which he obtained by virtue of the exercise of the joint power must be treated as derived and derived only out of the estate tail in remainder which he had previously had, and was not to be referred in any way or for any purpose to the interest of his father. It appears to me, with great respect, that those cases are of no assistance in the decision of this case. The learned judge relied on language used in those cases which he considered applied to the present case. The most important passages on which he relied were from the speech of Lord Cranworth in *Attorney-General* v. *Floyer* (1), where Lord Cranworth, referring to *Lord Braybrooke's* case (2), said (3) : " The decision of this House shows that in order to "ascertain who is the settlor, within the second section, i.e., "the settlor ' from whom the interest of the successor is "' derived,' we must inquire not who are the parties by whose "conveyance the estate has been created ? but who is the "conveying party out of whose estate the interest in question "has been derived ? " There is another citation which Bennett J. gave in his judgment to the like effect.

The learned judge then proceeded to ask this question : Out of whose estate were the respective interests of Mr. Thomas Tyrwhitt Drake, Mrs. Venice Tyrwhitt Drake, and the infant defendants derived—using the language of Lord Cranworth—and he answered the question by saying that they were derived and derived only out of the estate of Edward. But when Lord Cranworth's words are read in connection with the subject-matter with which he was dealing they do not, to my mind, bear the construction which the learned judge has put on them. When Lord Cranworth asked: "Who is "the conveying party out of whose estate the interest "in question has been derived?" he was dealing with a case where the substantial question was: Who was the conveying party out of whose estate this life interest in remainder taken by the son under the resettlement was derived? And the answer to it was: Out of his own previous estate tail in remainder and out of nothing else. That does not seem to me really to have any bearing on the present problem.

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(1) 9 H. L. C. 477.
(2) 9 H. L. C. 150.
(3) 9 H. L. C. 489.

The learned judge does not appear to me to have applied the test as it was applied by Lord Cranworth. In fact, it was applied by Lord Cranworth with reference, and with reference only, to the date when the succession came into existence. But Bennett J. interpreted the word "derived" not as derived at the date when the succession was created but as derived at the date when the after event happened—namely, in this case the death of Edward. That, in my opinion, is not legitimate, because, as I have already said when I was examining the language of s. 13, the word "derive" in that section is the same word that is used in s. 2, and it is contemplating the date when the successor derived his succession, which is the date of its creation. The learned judge has interpreted the word "derive" (which, I think, if I may say so, was deliberately used by Lord Cranworth, as it is the technical word used in the Act) as applying to a later period years after the succession was created. With great respect to the learned judge, I think that he has used the language of Lord Cranworth in a way that is not legitimate.

There only remains one other matter to deal with, and that is an argument which Mr. Spens put forward to this effect. He said that when the relevant document in this case is examined, and when certain evidence is looked at, the true nature of the transaction which took place in 1917 was not a joint settlement by uncle and nephew of the family estates but was a transaction under which the nephew bought out his uncle, purchased for consideration his uncle's contingent interest, and then proceeded himself to effect the settlement, notwithstanding the circumstance that on the face of the document the uncle appears as one of the settlors. The circumstance in the transaction itself on which this argument is founded is that under the agreement of 1917 the uncle, Percy, was to be paid outright a sum of 10,000*l.*, which was part of a sum of 15,000*l.* appointed to Edward by his father under an overriding power to charge portions in favour of younger children, Edward at that date being a younger child, because his brother Herbert was still alive. Under the agreement Edward gave to Percy, his uncle, 10,000*l.* absolutely out of that 15,000*l.* There was also a provision under which certain estates known as the Cheshire Estates were released by Percy—who had exactly the same contingent interest in them under Herbert's will as in the other estates—and transferred absolutely to Edward.

It is said that this was really a commercial transaction under which Percy was in effect paid out. All I need say about that is that I entirely agree with the conclusion of the learned judge on that point. It appears to me that the document on the face of it is one which is not consistent with the argument, and that moreover, if the evidence is looked at, it really negatives the existence of any such arrangement between these parties. The real substance of the matter was that the position was not at all one in which persons interested in the preservation of family property would care to be. Two persons who alone could produce an effective resettlement combined to do so, and they did so by this arrangement. I cannot read the transaction as being anything else than an arrangement by which these two pooled their resources, so to speak, and made an effective resettlement of the family estates. To treat Edward as the sole settlor, on the footing that he bought his uncle out, appears to me to be to misunderstand the whole transaction. That being so, the decision of the learned judge cannot stand and there must be an appropriate declaration, the actual terms of which can be discussed later.

I should add that in the judgment which I have delivered

I have concentrated really on Thomas for simplicity, but the position of the children is governed by the same principles, because the portions which they take were derived from the same document and became effective in the same way.

ROMER L.J. On the question whether in the circumstances the case is to be treated as though Edward purchased the contingent interests of Percy and, having so become entitled in any event to the property, settled that property in the way indicated in the settlement of 1921, I agree with the decision arrived at by Bennett J. for the reasons given by him, and also for the reasons just given by the Master of the Rolls. It appears to me that it is no more possible to say that Edward bought out Percy and then settled the entirety than it is possible to say that Percy bought out the interests of Edward and himself settled the entirety. The truth of the matter is, I think, whether one looks at the settlement alone or at the settlement in the light of the surrounding circumstances, that neither one bought from the other, but that both being together entitled to an absolute interest in the property joined together in settling that property in the manner that has been described by the Master of the Rolls.

But I am unable to agree with the learned judge in the conclusion at which he arrived upon the question: Who is to be considered as the predecessor in the present case? In considering that question it is essential to bear in mind that for the purpose of the Succession Duty Act the succession arises at the date that the disposition creating the succession comes into force. That has been pointed out in several cases, and I do not think is really disputed by anybody in this Court. In *Wolverton* v. *Attorney-General* (1) Lord Herschell said (2), in relation to a case where the testator bequeathed his residuary estate after the death of Lady Wolverton to certain co-heiresses: "There can be no doubt, as was admitted by "the Crown, that the disposition by the testator by reason "whereof the co-heiresses became entitled to his residuary "estate upon the death of Lady Wolverton conferred a

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(1) [1898] A. C. 535.
(2) Ibid. 547.

"succession, and that they became 'successors' and the "testator their 'predecessor' within the meaning of the "second section of the Succession Duty Act. I take it to be "equally clear that the succession came into existence as "soon as the testator died, and that its creation was not "postponed until the death of the tenant for life. Indeed, "this was admitted by the Solicitor-General as soon as his "attention was called to the terms of the section making it "applicable to past dispositions." In what I was saying just now I was, of course, referring only to dispositions which took effect after the coming into operation of the Succession Duty Act. Again, Lord Herschell said (1): "The words of "s. 10 are precise: 'There shall be levied and paid to "'Her Majesty in respect of *every* such succession as aforesaid' "the following duties; and these are made dependent on the "relationship of the predecessor and successor. This provision "operates, in my opinion, as soon as the disposition is made "by which a 'succession' is conferred." The same point is emphasized in *Attorney-General* v. *Belilios.* (2) In that case Sargant L.J. said (3): "It is important to observe that under "the Act of 1853 a succession is constituted, if at all, immediately "on the death of the testator, and not on the death of the "tenant for life, or other limited owner, on whose death the "successor becomes entitled in possession; and the succession "duty attaches immediately on the earlier event, and is "merely postponed as to payment till the later event."

I therefore approach this case in the light of those authorities, and so approaching it I confess that it seems to me plain that when the settlement of 1921 came into operation —and for the purpose of this case we are to treat it as though it came into operation in 1917—there was created in favour of Thomas—and, like the Master of the Rolls, for the sake of simplicity, I am only going to consider Thomas and not the daughters of Edward—a vested estate tail in remainder. That arose immediately the settlement came into operation and, coming into operation then, it must be possible to say who at

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(1) [1898] A. C. 548.
(2) [1928] 1 K. B. 798.
(3) Ibid. 822.

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that time was the predecessor from whom that succession was derived. As I have already said, on the coming into operation of the settlement, Thomas became entitled to a vested estate in tail male in remainder. Through whom was that vested estate derived ? Obviously not from Edward alone ; obviously not from Percy alone. If each one of them separately had settled his contingent interests in the way indicated in the settlement of 1921, Thomas would not have become entitled under either to a vested estate in tail male in remainder. He would have been entitled under each to a contingent estate in tail male in remainder. To make that clear one must refer to the definition in the Act of 1853 of " succession " which is there defined as denoting " any property chargeable with "duty under this Act." Turning to s. 42 one finds that the duty imposed by the Act is constituted a first charge on the interest of the successor in the property, whether real or personal. That means the property which is the subject-matter of the disposition, and therefore in s. 2 a succession means an interest, whether contingent or vested, in property, whether real or personal, which is charged by s. 42.

It is plain that the interest charged under the Act, if there was here one settlement only, would be totally different from the interests charged under the Act if we were to concede that there were two settlements made. That being so, it seems to me there can be only one answer to the question : From whom was that vested interest in remainder derived ? It can only have been derived from the two settlors operating together. Therefore it appears to me that this is a case where the succession, that is to say the interest in the property charged in the Act, has been derived not from Edward alone or from Percy alone but from the two together. Further, if, as I think is the case, it must be possible at the date when the disposition comes into force to say who is the predecessor, it must be possible to say at that time what is the rate of duty to be charged. The amount of duty actually payable will not be ascertained, if it ever falls to be ascertained at all, until the succession falls into possession.

Sect. 13 seems clearly to contemplate the possibility of there being a disposition creating a succession in property made by more than one predecessor whose interests are distinguishable. The section, however, is only referring to one succession. A succession, therefore, is contemplated by the Act as being created by two or more predecessors whose interests are distinguishable. That is a position which it appears to me could never arise if the contention put forward by Mr. Spens and Mr. Stamp be accepted, because if two or more people join together in making a disposition of property, each of those persons having a distinguishable interest in the property, then, according to the argument which we have heard, there is not one succession created but a number of successions created equivalent in number to the number of the persons who join together in the transaction.

For these reasons, in addition to those which have been given by the Master of the Rolls, I have come to the conclusion that the predecessors were Edward and Percy together and that, their interests being indistinguishable, s. 13 comes into operation.

MACKINNON L.J. I agree, and I do not think that I can usefully add anything.

Appeal allowed.

Solicitors: *Blyth, Dutton, Hartley & Blyth*; *Bircham & Co.*; *Solicitor of Inland Revenue.*

H. C. G.

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J.
1937
Oct. 14.

In re WINTERSTOKE'S WILL TRUSTS.

GUNN *v.* RICHARDSON.

[1937. W. 722.]

Apportionment—Dividends—Tenant for life and remainderman—Death of tenant for life during dividend period—Sale of securities "cum "dividend"—Dividend accruing during lifetime of tenant for life.

Where, on the death of a tenant for life, the trustees of the settlement sell securities "cum dividend," and part of the dividend accrued while the tenant for life was alive, the trustees should, if requested so to do, account to the executors of the tenant for life for the proportion of the dividend which has so accrued, so as to preserve the rights which the deceased tenant for life would have had if the securities had been sold "ex dividend."

Bulkeley v. *Stephens* [1896] 2 Ch. 241 considered.

ADJOURNED SUMMONS.

The testator, William Henry, first Baron Winterstoke of Blagdon, died on January 29, 1911, having by his will, dated July 15, 1907, created certain trusts for two ladies in equal moieties as tenants for life and, subject to those life interests, for various remaindermen. One of the tenants for life died on August 22, 1932, and one moiety of the trust funds was distributed. The other died on September 22, 1936. The moiety of the estate whence her income was derived was about 1,300,000*l.*, the estate duty amounting to about 500,000*l.* The estate included ordinary stocks on which the final dividend for the financial year ending on October 31, 1936, was to be declared and payable in March, 1937: an interim dividend had been paid to the tenant for life shortly before her death. The trustees sold certain of the stocks to pay death duties, selling in every case "cum dividend" so that no current dividend was received by them. An apportionment of the dividend accruing from the date of the last payment of dividend until the date of the death of the tenant for life showed that the amount was 2160*l.* 13*s.* 1*d.* The executors of the tenant for life contended that that amount should be paid to them; and by this summons the trustees asked (inter alia) whether the whole of the purchase price of the stock was to be treated as capital, or whether it was to be apportioned between capital and income by appropriating the 2160*l*. 13*s*. 1*d*. to income.

Roger Turnbull for the trustees.

Fergus D. Morton K.C. and *L. W. Byrne* for the executors of the tenant for life. In the case of each of the investments in question all fixed interest and dividend was accruing at the date of the death. Had there been no sale, the tenant for life would have a legal right which is enforceable when the dividend becomes due. The sale took place, not because of any provision in the will, but because certain estate duties had to be paid. It may be that the tenant for life's legal right to recover was destroyed, but whether that be so or not, when the trustees come to the Court and ask what ought to be paid to the tenant for life, the Court will direct that sum to be paid which accrued due before the death.

The position is a curious one, because the right accrues, not when the dividend in question is received by the trustees, but when it becomes due and payable. The difficulty is that the dividend, in the actual form of dividend, has not been received by the trustees of the will.

In *Bulkeley* v. *Stephens* (1) Stirling J. gave effect to a claim exactly like that which is now being put before the Court: his dicta as to the general rule are therefore obiter.

F. R. Evershed K.C. and *W. F. Waite* for all other parties. The actual order made in *Bulkeley* v. *Stephens* (1) depended on the special words of the will. In that case Stirling J. held that in the ordinary course of the execution of a trust there is no apportionment of the purchase price, following *Scholefield* v. *Redfern* (2) and *Freman* v. *Whitbread* (3), from which it is clear that there is no apportionment of the purchase price on a sale by trustees. That rule is based on the principle that the burden on the trustees should not be increased, and on the fact that it may be impossible to work out a proper apportionment.

(1) [1896] 2 Ch. 241.
(2) (1863) 2 Dr. & Sm. 173.
(3) (1865) L. R. 1 Eq. 266.

The result of these decisions is that, generally, upon a sale by trustees, there is no apportionment: then there is *Bulkeley* v. *Stephens* (1), where Stirling J. says that there is no apportionment where the facts are no more than that the tenant for life is dead and that the securities are sold.

In the present case the direction to divide in specie is simply made subject to the life interest. Therefore it must be made subject to the trustees' liability to pay estate duty. The direction to divide among the beneficiaries is a direction to divide in specie what is left after the life interest. That distinguishes this will from the will in *Bulkeley* v. *Stephens*. (1) If that is so, then the matter comes down simply to the question whether what Stirling J. said, if it be obiter, is right or not right. His dicta in that case have not been criticized in any other case.

CLAUSON J. [having stated the facts:] In order to deal with the question of principle in simple language, I will take the case of a fund consisting of 10,000*l.* Government securities carrying a half-yearly dividend. I will first assume that the trusts are to pay the income to A. B. during his life, after his death to pay the income to C. D. for his life, and, subject to those two life interests, to hold the fund in trust for E. F. A. B. dies at a date at which two months of the current half-year have elapsed. C. D. is surviving, and continues to live until after the end of that half-year. No change is made in the investments. Nobody doubts that it would be the duty of the trustees, on receiving the dividend four months after A. B.'s death, to pay one-third of it to the executors of A. B. and pay the other two-thirds to C. D. Suppose, however, that the trusts are not for A. B. for life and then to C. D. for life and, subject to their life interests, for E. F., but are for A. B. for life and, subject to his life interest, for E. F. Under those circumstances it would be astonishing that A. B., by himself or his executors, should receive less income in respect of his life interest than he would have received if, after his life interest, another life interest had been interposed. It is suggested that if, in the simple case that I have put of A. B. being the tenant for life and, on his death, the fund being held in trust for E. F., the trustees sell the securities in the ordinary way on the Stock Exchange—a sale which would carry to the purchaser the right to receive the whole of the half-yearly dividend—A. B.'s rights are thereby altered and his executors are deprived of the two months' income from the last dividend date to the date of A. B.'s death, which, it is obvious, in view of the trusts which I have stated, the settlor or the testator intended A. B. to have.

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(1) [1896] 2 Ch. 241.

In my judgment, the solution of the difficulty is this. The trustees, when they sell the securities, ought so to arrange matters as to preserve, if they reasonably can be preserved, the rights of A. B. One way of preserving the rights of A. B. would be to defer the sale until after the half-year has expired. If they do that, no difficulty arises, because the trustees will themselves have received the whole of the half-year's dividend, and they will apportion it, and give the executors of A. B. the third to which they are entitled. I have some reason to believe that in practice this is very often done. It may be, however, that there are inconveniences in deferring the sale until after the end of the half-year, and that the trustees feel that they ought to sell the securities at once, as they did in this case. It would, theoretically, be possible for them to sell to a purchaser on a special bargain that the purchaser, in due course, when the dividend is paid, should account to the trustees, the vendors, for an apportioned part of the dividend, for which they would thereupon account to the executors of A. B. No practical stockbroker would ever advise an attempt to deal with securities on sale by such an artificial method as that. Another way would be simply to sell so that the purchaser receives the dividend and, on the receipt of the purchase price, to set aside out of the purchase price a sum equivalent to the dividend, apportioned as from the last dividend due before the death until the death of the tenant for life, and account for that sum to the executors of the tenant for life. That process will carry out precisely what the testator intended, and will give the tenant for life the income which the testator intended he should have. In the present case the trustees, before the end of the dividend period, sold, and there is no difficulty in ascertaining that figure which would represent the apportioned dividend from the dividend date last preceding the death of the tenant for life to the date of the tenant for life's death. The figure has been ascertained and appears in the summons as 2160*l.* 13*s.* 1*d.* I do not propose to say that trustees, who in fact sold under those circumstances and, without the question being raised by anybody, in fact failed to account to the executors of the tenant for life for the apportioned dividend and allowed the whole purchase money to be taken by the remaindermen, would necessarily be liable for breach of trust. In small cases, I dare say even in large cases, it has no doubt been the practice, a practice possibly justified by certain dicta of Stirling J. in *Bulkeley* v. *Stephens* (1), not to make this special reservation for the tenant for life or to account to his executors for the apportioned dividend; but it appears to me that when the question has been raised and there is no difficulty in ascertaining the figure which would be payable to the executors of the tenant for life, the trustees may properly deal and ought to deal with the matter in the way I have indicated, that is to say, by accounting to the executors of the tenant for life for the apportioned dividend.

In the present case the executors of the tenant for life claim that that should be done. The trustees ask for the direction of the Court whether they should accede to that request and do it. As, in acceding to that request, they seem to me to be carrying out the intention of the testator, and not to be doing any act which is detrimental to, or interferes with, any right of the remaindermen, I propose to declare that the trustees ought, in the present case, not to treat the whole of the purchase price as capital, but ought to apportion it as between, on the one hand, the remaindermen, and, on the other, the executors of the tenant for life, by paying over to the executors of the tenant for life, out

(1) [1896] 2 Ch. 241.

of the purchase price, the sum of 2160*l.* 13*s.* 1*d.*, being the sum representing the proportion of dividend accruing on the securities so sold, calculated to the date of the death of the tenant for life.

Solicitors: *Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall, Abbott & Co., Bristol; Gregory, Rowcliffe & Co., for Bevan, Hancock & Co., Bristol; Robins, Hay & Waters, for Mann, Rodway & Green, Trowbridge.*

K. R. A. H.

C. A.

1937

Oct. 28, 29.

BYNOE *v.* GENERAL FEDERATION OF TRADE UNIONS APPROVED SOCIETY.

[1936. B. 3409.]

Insurance (National Health) — Dental benefit — "Dentist" — Medical Practitioner not on dentists' register—Treatment of insured person—No right to payment for treatment from approved society—Dentists Act, 1878 (41 *&* 42 *Vict. c.* 33), *ss.* 3, 6—*Dentists Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 21), *s.* 1—*National Health Insurance Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 38), *ss.* 22, 75, 93—*National Health Insurance Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 14), *s.* 16, *sub-s.* 3—*National Health Insurance (Dental Benefit) Regulations,* 1930, *regs.* 2, 21.

A registered medical practitioner, although entitled to practice dentistry under s. 1, sub-s. 3, of the Dentists Act, 1921, is not entitled to give dental treatment to a patient insured under the National Health Insurance Acts, 1924 to 1928, for which fees can be charged to and payment demanded from the patient's approved society under the National Health Insurance (Dental Benefit) Regulations, 1930, unless he is a dentist registered in the dentists' register kept under the Dentists Act, 1878. These regulations, having been approved after being laid before Parliament, have the same effect as if they had been enacted in an Act of Parliament.

So *held* by the Court of Appeal, affirming the decision of Simonds J.

APPEAL from a decision of Simonds J. (1)

The plaintiff claimed an injunction to restrain the defendants from writing, publishing or uttering any letter, document, publication or words to the effect or implying that the plaintiff was not a person entitled to give dental services and to receive in respect thereof payment from the defendants or any other person under reg. 21 of the National Health Insurance (Dental Benefit) Regulations, 1930, or under the National Health Insurance Acts, 1924 to 1928. The defendants denied that the plaintiff was a "dentist" within the meaning of the regulations.

The plaintiff was a duly qualified and registered medical practitioner, but was not registered as a dentist in the dentists' register established by the Dentists Act, 1878. He claimed,

(1) [1937] Ch. 628.

however, to be a dentist prepared to supply dental treatment to insured persons at scale fees, and in or about February, 1935, he supplied dental treatment to one W. J. Evans, a member of the defendant society, and afterwards sent in an account of his charges for the treatment amounting to 1*l.* 12*s.* 6*d.* to the defendants, on a prescribed form known as a " dental letter." The defendants did not pay the charges, and on February 6, 1935, they wrote to Evans saying that they had received the estimate for his dental treatment, but could not pay the charges or deal with the dental letter, on the ground that the plaintiff's name was not on the dentists' register. They suggested that Evans should obtain an estimate from another dentist on the register, and another dental letter. The plaintiff alleged that this letter of the defendants implied that he was not qualified to give dental services and to obtain payment therefor from the defendants.

The National Health Insurance (Dental Benefit) Regulations, 1930 (Stat. Rules & Orders, 1930, No. 1060), made under the National Health Insurance Acts, 1924 to 1928, provide—

Reg. 2: " Dental benefit " means the additional benefit numbered 9 in the Third Schedule to the Act.

" Dentist " means a person who is duly registered in the dentists' register kept under the Dentists Acts, 1878 to 1923, or any Act amending those Acts.

Reg. 21 (1.): Subject to the provisions of these Regulations a member shall be entitled to obtain dental treatment from any dentist who is prepared to provide such treatment at fees not exceeding those set out in the Second Schedule to these regulations (hereinafter referred to as the " scale fees ") not being a dentist who is for the time declared by the Minister to be unsuitable for service in connection with dental benefit as the result of an inquiry. . . .

It was not suggested that the plaintiff had at any time been declared unsuitable for service in connection with dental benefit.

The form of " dental letter " is set out in the Third Schedule to the regulations.

The material provisions of the Dentists Acts, 1878 and 1921, and the National Insurance Acts, 1924 and 1928, are set out in the judgment of Simonds J.

Simonds J. dismissed the action.

The plaintiff appealed. The appeal was heard on October 28, 29, 1937.

The Plaintiff in person. I claim to be able to give dental treatment and to be paid for so doing as being a registered medical practitioner. The National Health Insurance (Dental Benefit) Regulations, 1930 (S. R. & O. 1930, No. 1060), by reg. 21 provides that subject to the provisions of these regulations a member shall be entitled to obtain medical benefit from any dentist who has not been declared by the Minister to be unsuited for service in connection with dental benefit. So far there is nothing to exclude me. I am a registered medical practitioner under the Medical Act, 1858, s. 31, and therefore qualified to practice dentistry. At the time when the Dentists Act, 1878, was passed there were a great number of charlatans practising dentistry, and the Act was passed to prevent charlatans from doing so, but could not affect the position of registered medical practitioners. It would have been infra dig. for me to register under that Act, though I was free to do so. The position of a registered medical practitioner practising dentistry is recognized by the Dentists Act, 1921, s. 1, sub-s. 3. The difficulty here is created by reg. 2 of the 1930 Regulations, which defines "dentist" as meaning "a person who is duly registered in "the dentists' register kept under the Dentists Acts, 1878 to "1923, or any Act amending these Acts." In so far as these regulations deprive me of the right to practice for all purposes as a dentist they are ultra vires.

[SIR WILFRID GREENE M.R. What was it that conferred the power to make the regulations ?]

They were made under the National Health Insurance Acts, 1924 to 1928. The material provisions are in s. 93 of the 1924 Act and s. 75, sub-s. 7, of the 1928 Act.

[SIR WILFRID GREENE M.R. Is the position under the 1921 Act that while a registered medical practitioner is entitled to practice dentistry he may not call himself a dentist ?]

It is true that s. 1, sub-s. 1, of the Dentists Act, 1921, provides that no person not registered under the 1878 Act may hold himself out as practising dentistry, but sub-s. 3 contains a special saving for registered medical practitioners. In so far as the regulations purpose to prevent a registered medical practitioner from practising dentistry for panel patients it is contrary to the 1921 Act and illegal.

[Sir Wilfrid Greene M.R. Your difficulty is that the regulations have the force of a statute and they only allow a registered dentist to do work for panel patients.]

These regulations have not been voted on by Parliament and assented to by the King. They have been made under an Act of Parliament, but are not an Act of Parliament.

It cannot have been the intention of Parliament that I should be deprived of the means of earning my living.

Alexander Grant K.C. and *A. de W. Mulligan* for the respondents were not called upon to argue.

Sir Wilfrid Greene M.R. This is a case in which the appellant, Mr. Bynoe, has a feeling of grievance and, speaking for myself, I can well understand his point of view. Unfortunately, the grievance is one which, as Simonds J. has found, and as this Court affirms, is the result of legislation which Parliament has thought fit to enact. It is not for us to consider the reasons which Parliament may have had for so enacting—we can only assume that Parliament had abundant and good reasons for taking the course that it did. All that we can do is to administer the law as we find it, even though in individual cases it may appear to lead to hardship.

Mr. Bynoe is a registered medical practitioner, who has practised for many, many years. He tells us that, for the last thirty-nine years of his life, he has been confining himself to the practice of dentistry, a thing which he is perfectly entitled to do under the law. The statutory provisions with regard to the practice of dentistry are, for the present purposes, to this effect. A person who is a duly and legally qualified registered medical practitioner is entitled to practise dentistry notwithstanding the fact that he is not a dentist registered in the dentists' register kept under the Dentists Acts, beginning with the Act of 1878. For present purposes, there are two classes of persons entitled to practise as dentists in this country. The first is the class who are registered in the dentists' register. The second is the class of duly qualified and registered medical practitioners who are entitled to practise dentistry notwithstanding that they are not on the dentists' register.

When the National Health Insurance Acts were passed, the benefits which were thereby secured for insured persons were to be administered through approved societies. From the point of view of the professional man who is going to assist in the administration of benefits—for example, medical benefits in the case of a doctor—he, under the scheme of the Act, becomes entitled to obtain his remuneration not from the patient whom he treats, but from the society to which that patient belongs. That is the broad scheme for administration of benefits ; and dental benefit, which is what is called an " additional benefit " under the Acts, is administered in the same way. Parliament, in providing for that scheme of administration, thought fit to say that it is only to be worked in the case of dental benefit by one out of those two classes of dental practitioners which I have mentioned—namely, the dentist duly registered in the dentists' register. Parliament has not thought fit to extend its provisions to the case of a duly qualified and registered medical practitioner, entitled to practise dentistry, but not in fact on the dentists' register. Parliament might have done otherwise if it had thought right, but for reasons, which we can assume are good reasons, it has decided to confine the working of those schemes, in the case of dental benefit, to that particular category of persons entitled to practise dentistry consisting of those whose names appear on the dentists' register.

The effect of that in Mr. Bynoe's case is, obviously, from his point of view, very unfortunate, because, his practice being entirely a practice in dentistry, he finds himself precluded from being employed in the case of dental benefit under the scheme, in such a way that he can call on the approved society to pay him his fees. If any member of an approved society chose to employ Mr. Bynoe outside the Acts altogether, and outside the schemes under it, there is nothing to prevent him treating such a person. In that case, of course, he would be entitled to recover his fees from the patient. Nothing that the Insurance Act has done has altered that state of affairs ; but the result from Mr. Bynoe's point of view is that in practice the insured person, who has been paying contributions in order to have the benefit of the Insurance Act, is not going to give himself the luxury of paying privately for private treatment, and he naturally goes for his dental treatment to a dental practitioner whose fees will be covered by the scheme and provided for under the scheme by the society to which he belongs. Accordingly, an insured person who requires dental treatment would, in a normal case, choose a duly registered dentist on the dentists' register, because he is the only kind of dentist who comes under the scheme. The effect on Mr. Bynoe can be well understood if, as I gather from what he says, his practice has been very largely among persons who fall under the provisions of the National Insurance Act.

I have tried to explain this matter in simple language as far as I can because I am very anxious that Mr. Bynoe should go away feeling that his case has been fully considered, and that there is no help for him in view of what Parliament has thought fit to do. That is why I have taken some pains to put, as clearly and simply as I can, what the position is from his point of view.

But I must look a little more closely at the structure of the law with regard to this matter. I should be content to say that I agree with the careful judgment of the learned judge and add nothing to it, but to make this judgment complete I must say a little more. The scheme for dental benefit is provided out of surpluses which appear on the valuations of societies. Sect. 75, sub-s. 2, of the Act of 1924 provides that " A scheme "—that is to say, a scheme for additional benefits—" made under this section may determine "the conditions to be complied with as respects the additional "benefits," and so on. Then, in the later Act of 1928, by s. 16, sub-s. 3, it is provided that " Regulations may be made "with respect to the administration of schemes under this "section and of any additional benefit." It is under that power to make regulations, and under the general power to make regulations in the Act, that what are called the " National "Health Insurance (Dental Benefit) Regulations " were made. Before passing from s. 16, sub-s. 3, of the Act of 1928 I should just mention that there is a proviso which limits the power to make regulations in a particular not relevant to the present case. The proviso states : " Provided that such regulations "shall not restrict the right on the part of any insured person "to obtain treatment from any practitioner, clinic or other "institution with whom arrangements with respect to that "form of treatment have been made in accordance with the "regulations." Mr. Bynoe appears to be under the impression that that proviso, in some way, prohibits the making of regulations which would prevent an insured person obtaining treatment from him. But what he has failed to observe is that that proviso does not apply to *all* practitioners, but only to practitioners with whom the arrangements specified have been made. Therefore, the proviso (and I hope he will carefully read it again in the light of what I have been saying, and convince himself upon it) does not apply to him.

The rule-making power is one which, very fully and very widely, gives power to make these regulations. When the procedure laid down in the Act has been gone through the regulations have effect as if enacted in the Act. That is what Parliament has provided. Mr. Bynoe, I hope, will appreciate that a regulation made under the authority of an Act of Parliament, which provides that the regulation when made shall have the force of an Act of Parliament, has the force of an Act of Parliament, provided that it is not ultra vires. I can see no ground for the suggestion that these regulations are ultra vires. It appears to me to have been perfectly competent to the authority entrusted with the power of

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making regulations to provide that the particular and special machinery relating to the administration of benefits under the Insurance Act should only come into operation in the case where the dental practitioner is a registered dentist on the dentists' register. That has been done quite clearly, because the definition clause, in para. 2 of the regulations, defines " dentist " as meaning a person who is duly registered in the dentists' register kept under the Dentists Acts of 1878 to 1923, or any Act amending those Acts. Mr. Bynoe is not a dentist so registered, and, therefore, he cannot obtain the benefit of the Act or of the provision in para. 21 of the regulations which provides for free choice of dentist. That says this : " Subject to the provisions of these regulations, a "member "—that is to say, a member of an approved society —" shall be entitled to obtain dental treatment from any "dentist who is prepared to provide such treatment." "Dentist " there means, and means for the purposes of these regulations, a registered dentist, and nobody else. It does not include, unless he is on the dentists' register, a duly qualified and registered medical practitioner who is entitled to practise dentistry.

That is the short answer to this case. As I have said, the judgment of the learned judge is manifestly right. I have only delivered a rather more elaborate judgment than I otherwise should have done in the hope, as I have said, that Mr. Bynoe, with the assistance of my judgment and that of the learned judge and the judgments of my colleagues, will be satisfied that the Act of Parliament has the effect which I have stated. The appeal must be dismissed.

ROMER L.J. No one who has heard the facts of this case can help feeling considerable sympathy with Mr. Bynoe in the position in which he finds himself. But we have to administer the law as we find it. We have nothing at all to do with the wisdom or justice of that law, and I fear it is only too clear that the effect of the Acts and regulations to which our attention has been called is that which Simonds J., and now my Lord, have stated it to be. I agree that this appeal fails.

MacKinnon L.J. I agree. Mr. Bynoe's grievance arises by virtue of the definition of " Dentist " in s. 2 of the regulations. We have not heard Mr. Grant ; and I do not know whether it would have been possible for him to suggest any reason why that definition was framed in the words which are used. But, in the absence of any such explanation, it does appear to me that Mr. Bynoe has a very real grievance. I observe from s. 3, sub-s. 1, of the Dentists Act, 1921, that a person is entitled to become admitted as a registered dentist, or to be on the register of dentists, provided merely that he has attained the age of twenty-three years, that he has a good personal character, and has for five out of the seven years before the commencement of the Act been engaged, as his principal means of livelihood, in the practice of dentistry in the British Islands. That appears to me to suggest a very inferior educational equipment for the practice of dentistry to that supplied by the training of a man who has become a registered medical practitioner under the Medical Acts. But none the less, a man of that apparently minor qualification, having become a registered dentist, is by virtue of this definition privileged to enjoy the advantages accruing under the National Health Insurance Acts, whereas Mr. Bynoe, who is a registered medical practitioner and has been practising dentistry for 39 years, is denied those benefits. As I say, there may be some reason that is not apparent to me for this form of definition; but in the absence of such reasons I should suppose that it was so framed merely by mistake, and it ought to be framed in these terms : " ' Dentist ' "means a person who is duly registered on the dentists' "register, kept under the Dentists Acts, 1878 to 1923, or a "person who is entitled to use the name dentist and to "practise dentistry pursuant to the said Acts." If that form of definition had been used, Mr. Bynoe's grievance would have disappeared. But, as the matter stands, we have no option but to say that Mr. Bynoe's grievance, however real it may be, is one for which we can provide no remedy. I agree that, on the Acts of Parliament and the regulations as they stand, we have no option but to dismiss this appeal.

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Appeal dismissed.

Solicitors for respondents: *Vivian J. Williams & Co.*

W. I. C.

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Oct. 15, 18, 19; Nov. 15.

SUTHERLAND PUBLISHING COMPANY, LIMITED *v.* CAXTON PUBLISHING COMPANY, LIMITED.

[1935. S. 1415.]

Copyright—Infringement—Conversion—Damages—Ascertainment—Act of conversion—Limitation of time for commencement of action—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 6, 7, 10, 35.

C. having published a book which incorporated part of a book already published by S., S. brought an action against C. for damages both for infringement of copyright and for conversion. C. admitted both infringement and conversion and offered to pay damages for either infringement or conversion but not for both. The Court of Appeal decided on a point of law that the damages were cumulative and not alternative, and the action then came before Crossman J. for assessment of damages and for a decision whether or not damages for conversion came under the limitation of the time for commencement of an action in respect of infringement of copyright to three years next after the infringement, imposed by s. 10 of the Copyright Act, 1911. Crossman J. held (1.) that as the expression " an action in respect of infringe- " ment of copyright " was wide enough to cover the claim for damages for conversion, the limitation by s. 10 applied to conversion, (2.) that the time ran from the infringement and that the infringement was the printing of the infringing copies, and the claim for damages was limited to copies printed within three years before the issue of the writ, and (3.) that the conversion at the date of which the value of the infringing copies must be assessed was the order by C. to the binders to bind the unbound sheets containing the infringing copies into the bound copies of C.'s book. On appeal:—

Held, (1.) by Sir Wilfrid Greene M.R. and Romer L.J. (MacKinnon L.J. dissenting) that the limitation of three years did not apply to an action for damages for conversion under s. 7 of the Copyright Act, 1911, but that the limitation of time applicable was six years under the Limitation Act, 1623.

Held, (2.) (by the whole Court) that the act of conversion as at the date of which the value of the infringing copies ought to be ascertained was the delivery by C. of the bound copies to purchasers.

Order of Crossman J. [1937] Ch. 294 varied.

APPEAL and CROSS-APPEAL from a decision of Crossman J. (1)

The plaintiffs in this action, being publishers, claimed an injunction to restrain the defendants, also publishers, from infringing the plaintiffs' copyright in a literary work entitled

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(1) [1937] Ch. 294.

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"Heating and Ventilating," and an inquiry as to the damages suffered by the plaintiffs by reason of the defendants' infringement and conversion by the publication of a book entitled "Modern Practical Plumber," volume III., containing extracts from the plaintiffs' book.

The writ was issued on May 2, 1935.

By their defence the defendants admitted the infringement by the reproduction in their book of substantial parts of the plaintiffs' book, and submitted to the injunction claimed and to the inquiry as to damages suffered by the plaintiffs by the infringement which were recoverable in this action, but not for both; and the defendants offered to pay the costs of this action up to a motion for judgment, the costs of an inquiry being reserved. Two points of law arose upon the defence: (*a*) whether the plaintiffs were entitled in the action both to damages for infringement under s. 6, sub-s. 1, of the Copyright Act, 1911, and also to damages for conversion under s. 7 of the Act; and (*b*) whether the limit of time for an action to three years after infringement provided for by s. 10 of the Copyright Act, 1911, applied to damages for conversion.

The action was set down for trial on these points of law, and was heard by Farwell J. on November 6, 1935, when the learned judge decided the first question in the negative, but did not deal with the second question. His decision was reversed on February 7, 1936, by the Court of Appeal, who held unanimously that damages under s. 6, sub-s. 1, and s. 7 of the Copyright Act, 1911, were cumulative and not alternative, but did not decide the second question. (1)

The parties agreed that the inquiry as to damages should not be referred to a Master, but requested Crossman J. to deal with the inquiry so as to avoid the expense and delay of a reference to a Master, and references to the Court to determine questions of law which would arise, and probably an application to the Court to vary the Master's certificate. The inquiry came on before Crossman J. in November, 1936. The plaintiffs called witnesses as to the amount of the damages alleged to

(1) [1936] Ch. 323.

have been suffered by them. On January 14, 1937, his Lordship delivered a reserved judgment (1) in which he held (1.) that, as the expression "an action in respect of infringement of copyright" was wide enough to cover the damages for conversion, the limitation by s. 10 applied to conversion; (2.) that the time ran from the infringement and that the infringement was the printing of the infringing copies, and the claim for damages was limited to copies printed within three years before the issue of the writ; and (3.) that the conversion at the date of which the value of the infringing copies must be assessed was the order by the defendants to the binders to bind the unbound sheets containing the infringing copies into the bound copies of the defendants' book.

The plaintiffs appealed. There was also a cross-appeal by the defendants as to amount. The appeal and cross-appeal were heard on October 15, 18, 19, 1937.

K. E. Shelley K.C. and *Guy Aldous* for the appellants. The first question is whether the three years' limit imposed by s. 10 of the Copyright Act, 1911, applies to an action for conversion, and it is submitted that it does not. No action which is not within the terms of ss. 1 and 2 of the Act is an action for infringement of copyright. An action for conversion is not an action for infringement. Sect. 6 of the Act sums up ss. 2 and 3 and gives the remedies for infringement of copyright. Sect. 7 deals with conversion of the infringing matter and the remedies of the owner of the copyright for such conversion and is independent of the preceding matter. Sect. 35 defines the meaning of infringement and does not apply to conversion. As the limitation of three years imposed by s. 10 of the Copyright Act, 1911, does not apply to the claim for damages for conversion, the only limitation is six years under the Limitation Act of 1623. It is only so far as the action is for infringement that the three years' limit applies. In a copyright action the publisher of an infringing work is liable not only to delivery of the copies still in his hands but also to a claim for damages for conversion in respect of the copies sold. This is a special relief conferred by s. 7 of the Act which provides that infringing copies are to be deemed to be the property of the owner of the copyright. Sect. 10 substituted the word "infringement" for the words used in s. 26 of the Copyright Act, 1842, which fixed a twelve months' limit in respect of "any offence that shall be "committed against this Act." The effect is to limit the application of s. 10 of the 1911 Act. The Act of 1911 gives the owner of a copyright enormous advantages over what he had before and it is contended deliberately left the six years' limit for delivery up of the infringing copies. It is to be remembered that under the 1842 Act time ran from the commission of the offence and not from the infringement. Sect. 6 gives the widest possible relief for all infringements. It is true that it contains the words making the section subject to other provisions of the Act, but that refers primarily to s. 8. Sect. 7 contains a new remedy in respect of a special right thereby conferred and the language of s. 10 is such that it does not apply.

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(1) [1937] Ch. 294, 298.

Every action under the Act is for the invasion of the plaintiff's right: *Ash* v. *Hutchinson & Co. (Publishers), Ld.* (1); but s. 7 provides a special remedy for something which is not infringement; this remedy is available against an innocent bookseller who has converted by selling infringing copies: see *Niblett, Ld.* v. *Confectioners' Materials Co.* (2)

An order to the printer to bind sheets containing infringing matter is not a conversion. There is no conversion till the plaintiffs are refused possession of the infringing copies or the infringing copies are sold. Binding can make no difference, and Crossman J. misunderstood the authorities saying that a dealing with a chattel implies the assertion of a right inconsistent with that of the owner and is therefore an act of conversion. Nothing but the sale of infringing copies puts it out of the power of the vendor to hand them over to the person entitled to them under s. 7: see the statement of the general law in regard to conversion by

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(1) [1936] Ch. 489.

(2) [1921] 3 K. B. 387.

Blackburn J. in *Hollins* v. *Fowler.* (1) This is a case where the order to bind was given innocently and without knowledge that the sheets being bound contained in them some infringing matter. The only charge contained in the pleadings was a charge of conversion by sale of infringing copies. Conversion involves dealing with goods in a manner inconsistent with their true ownership and the assertion of a right inconsistent with that of the true owner: see *Oakley* v. *Lyster.* (2) A mere innocent order to bind is not a conversion. It is not denied that when a bound copy of a book which infringes is sold the expense of binding must be deducted from the value of the book.

Hon. S. O. Henn Collins K.C. and *E. J. MacGillivray* for the respondents. Even if there might be a case arising under s. 7 which did not depend on infringement, it is clearly not this case. The plaintiffs' action was for infringement and s. 7 provided an additional remedy. There are not two independent wrongs but two remedies for the same wrong. The cause of action under this statute is always in respect of an infringement: see *Read* v. *Brown.* (3) If a plaintiff sued a defendant under this Act for conversion only, he would have to prove that the work in respect of which there was conversion infringed the original work of a person within the dominions to which the Copyright Act applied, that the copyright had not expired and that the plaintiff is either the original owner or his assignee, and that the infringing copy was a reproduction of the original work and was made or imported in contravention of the Act and dealt with in some way by the defendant: see s. 35 of the Act of 1911. Therefore the plaintiff has to prove everything necessary for an action for infringement and s. 10 must therefore apply.

[SIR WILFRID GREENE M.R. The difficulty pressing on me is that of a person bringing into this country copies of a copyright work innocently; he is not infringing.]

The copies are "infringing copies" within s. 35, and in that case also the claim for conversion must be based on infringement. The Court should be very careful not to treat the three years' "limit" as inapplicable seeing that the same facts have to be proved.

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(1) (1875) L. R. 7 H. L. 757, 764.
(2) [1931] 1 K. B. 148, 153.
(3) (1888) 22 Q. B. D. 128, 132.

It has been a little lightly assumed that under s. 2, sub-s. 2, infringement of a copyright involves knowledge. The words towards the end of the sub-section are "any work which to "his knowledge infringes copyright or would infringe copy-"right if it had been made within the part of His Majesty's "dominions . . . ." It is contended that the words "to his "knowledge" do not apply to the second branch of the sentence.

[SIR WILFRID GREENE M.R. It would take much to persuade me that the phrase "to his knowledge" does not apply to both branches.]

The real question is what is the meaning of an action in respect of infringement as used in s. 7. There is no case giving a precise meaning to the expression. It is contended that any action brought under the Copyright Act is brought in respect of an infringement. A narrow construction would greatly cut down the protection conferred by s. 7.

On the cross-appeal two questions arise, (1.) the date of conversion and (2.) what chattel is converted. To deal first with the second question the learned judge has held that the infringing portion of the book published by the defendants is one-twentieth of its value. The question is whether to take that value as being what by means of the additions it is made to fetch in the market or its actual value at the time of conversion, that is the cost of production. It is what it cost to produce the composite whole, that is the value of which the plaintiffs receive one-twentieth. That is the measure of the damages on a claim for conversion. The damages for infringement would be measured quite differently.

[They referred to *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (1)]

Shelley K.C. replied on the appeal and cross-appeal.

Hon. S. O. Henn Collins K.C. replied on the cross-appeal.

Cur. adv. vult.

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(1) [1892] A. C. 166.

1937. Nov. 15. The following judgments were read:—

SIR WILFRID GREENE M.R. The appellants are the proprietors of the copyright in a book entitled "Heating and "Ventilating" and in this action they complain of the infringement of their copyright by the respondents and conversion of infringing copies. That infringement, which was admitted in the defence, consisted in the reproduction of substantial parts of the book in the third volume of a book published by the respondents and entitled "Modern Practical "Plumber." At the trial of the action Crossman J. granted an injunction and awarded to the appellants 50*l.* damages in respect of the infringement. At a previous stage in the history of the action this Court held that damages for infringement and damages for conversion of infringing copies are cumulative and not alternative remedies, and accordingly Crossman J. awarded a further sum by way of damages for conversion. The appellants now say that the sum awarded—namely, 150*l.*—is too small, the respondents by their cross-appeal that it is too large. Each party complains of the principle upon which the learned judge assessed the damages, and one at least of the questions raised is both difficult and important. That question, to which I will turn at once, concerns the construction of s. 10 of the Copyright Act, 1911. That section provides as follows: "An action in respect of "infringement of copyright shall not be commenced after the "expiration of three years next after the infringement."

Crossman J. held that the period of limitation prescribed by this section applies not merely to the claim for infringement but also to the claim for conversion, upon the ground (as I understand his judgment) that, as the action claims relief in respect of infringement, the section applies not merely to that claim but also to the additional claim based on conversion. He held, further, that for the purposes of the section "the "infringement" was the printing of infringing copies, and accordingly he held that the appellants' claim in conversion was limited to copies printed within three years before the issue of the writ in the action, i.e., since May 2, 1932.

Sect. 10 is the last of a group of sections the heading of which is "Civil Remedies." This heading is not strictly accurate since s. 7 does more than provide a remedy. It creates the right which is the foundation of the claim for conversion by vesting the property in infringing copies in the owner of the copyright. It provides as follows: "All "infringing copies of any work in which copyright subsists, "or of any substantial part thereof, and all plates used or "intended to be used for the production of such infringing "copies, shall be deemed to be the property of the owner of "the copyright, who accordingly may take proceedings for "the recovery of the possession thereof or in respect of the "conversion thereof."

As was pointed out by this Court in the previous appeal (1), the right thus created is something essentially different to copyright. The former is a right to corporeal property, the latter to incorporeal. The remedies also are different. In this connection it is instructive to refer to the Copyright Act, 1842. By s. 15 of that Act the remedy for what is called in the Act of 1911 "infringement of copyright" was a special action on the case. By s. 23 of the same Act, which for the first time vested the property in pirated works in the proprietor of the copyright, the remedy was by action of detinue or trover. The two conceptions are indeed fundamentally different and each right with its appropriate remedy falls into a different category.

As I have referred to the Act of 1842, it is convenient to complete the examination of it. Sect. 26 prescribed a twelve months' period of limitation for proceedings in respect of "any offence that shall be committed against this Act," the period running from the commission of the "offence." In the case of an action of trover or detinue brought under s. 23 the "offence" would appear to have been the refusal of the person in possession of the pirated copy to deliver it up to the proprietor of the copyright upon a demand being made by him in writing, since the making of such a demand is by the section made a condition precedent to the right to begin the action. The result, therefore, was that under this Act the same period of limitation, namely twelve months, applied both to the action for infringement and to the action of trover or detinue. But the date from which the period began to run was different in each case, being as to the former action the date of the infringement and as to the latter the date of the refusal to deliver up.

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(1) [1936] Ch. 323.

The Act of 1911 was an amending and consolidating Act. I can sympathize with those who think it unlikely that the Legislature in 1911 intended to alter the law by making the period of limitation different in the case of conversion to that in the case of infringement, since no sufficient reason for the change suggests itself. But it is fair to point out that even if s. 10 can and ought to be construed so as to cover a claim in conversion the result will be that the law has been altered in what seems to be a highly capricious manner. For the period of limitation in respect of the claim would begin to run not, as would be expected and was in effect provided by the Act of 1842, from the date of the act of conversion but from the date of "the infringement" with which the act of conversion has no logical connection whatever, except in a case where the same act (e.g., a sale which constitutes an infringement under s. 2, sub-s. 2) is both an infringement and a conversion. I myself can find no guidance in speculation as to what the Legislature probably intended in this amending and consolidating Act. Accordingly I turn to a more detailed examination of its provisions which must be interpreted according to the ordinary principles of construction.

The Act of 1911 is drafted upon a different principle to that of 1842. Sect. 1 confers a number of sole rights which are included in the word "copyright," while s. 2, sub-s. 1, provides that copyright shall be "deemed to be infringed by "any person who, without the consent of the owner of the copy- "right, does anything the sole right to do which is by this Act "conferred on the owner of the copyright." I am unable to find in the word "deemed" in this or any other section in the Act (including in particular s. 7) any special force which helps me in the solution of the present problem. Sub-sect. 2 emunerates certain further acts by the doing of which copyright is to be "deemed to be infringed" provided the person doing them has the knowledge required by the sub-section. Infringement of copyright is thus precisely defined. It is the technical statutory expression for certain acts done in derogation of the rights of the owner of the copyright. Those acts and none other constitute the statutory wrong of infringement; and by no feat of interpretation of which I am capable can the word "infringement" when used in the statute be made to mean or include any other wrong.

These, therefore, are the acts which constitute infringement. And here must be noted another act which is prohibited by the statute (s. 14), but is not an infringement of copyright. That act is the importation into the United Kingdom of copies of a copyright work as to which the owner of the copyright gives notice in writing to the Commissioners of Customs and Excise that he is desirous that such copies shall not be so imported. The importation of copies in contravention of this section is, in my opinion, emphatically not infringement of copyright, and that notwithstanding that by s. 35 they are included in the expression "infringing copies" where used in the Act. The definition in question is as follows: "'Infringing', when applied to a copy of a work in which "copyright subsists, means any copy, including any colourable "imitation, made, or imported in contravention of the pro-"visions of this Act."

The person who innocently imports such copies, i.e., without the knowledge required by s. 2, sub-s. 1, and the person who has them in his possession in the United Kingdom, whether or not he knows that they were improperly imported, alike commits no infringement of copyright. Nevertheless it is, in my opinion, incontestable that the moment they are imported they become by force of s. 7 the property of the owner of the copyright, whose title to them comes into existence from the mere importation without the necessity of any act of infringement by anybody. I can see no justification for reading into s. 7 any limitation which would exclude them.

There is another question upon the construction of s. 7 which has been debated, and that is whether or not in the case of copies the making of which was an infringement an action of conversion lies against a person, e.g., a bookseller who has disposed of them in all innocence. I can find nothing in the language of the section to exclude such a case. According to the plain language of the section, as it appears to me, such copies in the bookseller's possession are to be deemed to be the property of the owner of the copyright, who can take proceedings to recover them. If the innocent bookseller has parted with them in circumstances which would amount to a conversion on his part, the section appears to me quite plainly to give a right to recover damages from him for that conversion. This was the expressed opinion both of Lord Wright, when Master of the Rolls, upon the first appeal in this action (1) and of Romer L.J. in *Ash* v. *Hutchinson & Co.* (*Publishers*). (2) With these opinions I respectfully agree. It is to be noticed that in such a case an action brought against the innocent bookseller would not be brought in respect of any infringement of copyright by him since, ex hypothesi, he has not committed any infringement, although proof of infringement by the maker of the copies would be necessary in order to establish that they were infringing copies. In this latter respect there is a distinction between this case and the case of the imported copies, since there no allegation of infringement need or can be made. I may add that the view that the innocent bookseller can be sued is confirmed by the language of s. 23 of the Act of 1842, which gives a right of action against "any party who shall detain the same."

If the conclusions above expressed are correct, there are four main types of action which may fall to be brought by an owner of copyright: (1.) An action against an infringer claiming relief in respect of the infringement; (2.) an action against an infringer who has also converted the infringing copies, claiming relief in respect of both the infringement and the conversion; (3.) an action of conversion against a person, e.g., an innocent bookseller who has converted copies the making of which was an infringement but has not himself been guilty of any infringement; (4.) an action of conversion against a person who has converted copies which are infringing copies by reason of illegal importation.

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(1) [1936] Ch. 334.

(2) [1936] Ch. 489, 501.

I return now to consider the arguments addressed to us upon the construction of s. 10. Several alternative constructions were suggested. First of all, it was said that the section applies to every action the right to bring which is conferred by the Act. Upon this construction it would cover all four types of action enumerated above. This argument is really based upon the fact that s. 10 forms one of the group of sections headed by the caption "Civil Remedies." It is sufficient to point out in answer to this argument that by no process of interpretation can s. 10 be made to cover the fourth type mentioned above, since an action of that type cannot by any stretch of language be called "an action in respect "of infringement of copyright." Moreover, it would be impossible in such a case to fix the date as from which the period of limitation was to run, since there would not have been any infringement. I am unable to accept the view that "the infringement" from which the period would run would be the importation. As I have already pointed out, infringement in this Act is a technical word with a defined meaning, and the fact that for obvious reasons of convenience in definition the statute includes, under the phrase "infringing "copies," copies which have been illegally imported cannot convert into an infringement an act, *sc.* importation, which is not made an infringement by the statute.

It is then said that s. 10 applies to every case where an allegation of infringement by someone (not necessarily the defendant) must of necessity be made and proved before the cause of action can be established. This construction would cover the first three types mentioned above but would exclude the fourth. There does not appear to be any valid reason why the Legislature should have provided a period of limitation for the first three types different from that applicable to the fourth, which admittedly would be six years if the first argument is wrong. But be that as it may, I am unable to see how an action of the third type (i.e., against the innocent bookseller) can consistently with the plain meaning of words

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in the English language be described as an "action in respect "of infringement of copyright." It is suggested that some support for the argument can be extracted from the phrase "in respect of," particularly when contrasted with the words in s. 6, sub-s. 3, "action for infringement of copyright." I find myself quite unable to attach to so slight a difference in language consequences so far-reaching. If I were to accept this suggestion, I should be attributing to the Legislature a gross misuse of language, and I am not prepared to do so. Moreover, it would be necessary to apply the same interpretation to s. 8. That section provides that the only remedy is to be an injunction "in respect of the infringement if "the defendant proves that at the date of the infringement he "was not aware and had no reasonable ground for suspecting "that copyright subsisted in the work." This language shows, in my judgment, that the section is contemplating, and contemplating only, an action in which the defendant is charged with infringement and in so far only as the action is concerned with infringement. A construction of this section which would bring the innocent bookseller within its provisions so as to exempt him from a claim for damages for conversion would lead to absurd results. In the first place, what would be "the date of the infringement"? Would it be the date when the infringing manuscript was made by the author of the infringing work, or the date when printing of the copies was authorized by the publisher, or the date when the publisher, if he knew of the infringement, committed an act of infringement under s. 2, sub-s. 2, by selling them to the bookseller? Moreover, whichever of these dates be taken (unless it be the last—an unusual case) I can see no ground in reason why the bookseller's ignorance of the existence of copyright at the date of some act done by a third party at a time possibly long before the bookseller came into the picture at all should be the determining factor in giving him the benefit of the section. In my judgment, by no stretch of language can s. 8 be extended to cover anything but a claim in respect of infringement by the defendant himself.

Lastly, it is said that where a claim in conversion is coupled in the same action with a claim in respect of infringement s. 10 applies to both claims. This would cover the second type of action above mentioned, but not the third or fourth. One result of this construction would be that a plaintiff who instead of joining the two claims in one action brought two actions, as he would be entitled to do, there being two separate and distinct wrongs, would avoid the operation of the section in respect of the conversion claim. But there are, in my judgment, more fundamental objections to this construction. There is the objection already discussed in connection with s. 8 that several acts of infringement may well have taken place before the conversion to some of which the defendant may have been no party. In such a case I can find no logical ground upon which "the infringement" from which the period runs is to be selected. Moreover, the act of conversion may have taken place long after the act of infringement. A publisher infringes who authorizes the printer to print the infringing copies—those copies he may sell long after the infringement and he may sell them in batches with considerable intervals of time between them. Yet the result would be that the three years would begin to run not from the act of conversion but from the earlier date when the printing was authorized.

The results of the various constructions suggested on behalf of the respondents appear to me to be highly illogical and absurd. Nevertheless, this circumstance would not prevent the adoption of one or other of those constructions if upon the true interpretation of the language used it ought to be adopted. But when I find that each of these constructions involves straining and glossing the language of the section in a manner for which I can find no warrant, I am compelled to reject them. In my opinion the section means what it says. It is confined to claims in respect of infringement by the defendant. In respect of each act of infringement complained of (and the defendant may have committed several) the period runs from that act. This gives a clear and sensible meaning to the language used.

If it be thought that the result is one which the Legislature cannot well have intended, the explanation may lie in the fact that in adopting a new scheme of drafting by which "infringement" is defined as in s. 2 the Legislature overlooked the fact that by using the word "infringement" in s. 10 instead of the words "offence . . . . committed against this Act," which were used in s. 26 of the Act of 1842, it was not covering the whole ground. But however that may be, I find the words too plain and compelling to permit me to depart from what seems to me their natural meaning.

The result is, in my opinion, that in respect of the claim in conversion the period is six years running from the act of conversion.

This brings me to the next question: What was the act of conversion as at the date of which the value of the infringing copies ought to be ascertained? The learned judge held that that act was the order to the binders to bind the unbound sheets which contained the infringing matter and not, as the appellants contended, the delivery by the respondents of the bound copies to their purchasers. Having regard to my conclusion upon the cross-appeal, to be presently mentioned, this question has little practical importance in the present case. But my view with regard to it is that the delivery to the purchasers was the act of conversion and not the order to the binders. The delivery appears to me to be the first clear evidence of an intention on the part of the defendants to deal with the infringing copies in a way adverse to the plaintiffs. I think that the order to bind was equivocal, since it was not necessarily inconsistent with an intention to respect the plaintiffs' title. The point is necessarily an artificial one in view of the fact that the defendants never had any idea that the plaintiffs had any title to the infringing copies.

On the cross-appeal the defendants argue that the damages for conversion awarded by Crossman J. were ascertained upon a wrong principle. Crossman J. having held that the order to the binders was the act of conversion, proceeded to fix the value of the articles converted, *sc.* the unbound sheets, by ascertaining what they fetched when bound and sold, namely, 21*s.*, and deducting the cost of binding, namely, 1*s.*

He then fixed the proportion which the infringing passages bore to the whole at one-twentieth, a figure which is not disputed by either side, and applying this result to the agreed number of copies printed and bound during the period of three years before writ he arrived at a round figure of 150*l.* which he awarded as damages for conversion. He rejected the defendants' argument that the basis upon which the value of the unbound sheets ought to be assessed is the cost of the paper and printing or the price which the printer received for them. In my opinion, Crossman J. was right in rejecting this argument. The infringing matter when printed had in addition to its inherent value as paper and print a potential value derived from the fact that when combined with other matter, as it was, the combined product had a value greater than the sum of its parts. This potential value was realized by the defendants' own acts, and to rule it out in calculating the value of the article converted is, in my opinion, wholly illegitimate. The argument, if accepted, as embodying the true principle upon which damages for conversion ought to be assessed, would lead to extraordinary results, of which I may give one example.

Many triptychs painted by old masters have in course of time been broken up, with the result that their three component parts have come into the possession of different owners. If these parts are re-assembled, the triptych so restored to its original condition has a far greater value than that of the sum of its component parts taken separately. Yet according to the argument, if a dealer, having got each of the parts into his possession, proceeded to fasten them together with hinges and to convert them by selling the triptych so reconstructed, each owner could recover in damages only the value of his piece, leaving the dealer entitled to keep the difference between the sum of those values and the far greater price realized for the reconstituted triptych.

The defendants also claimed that deductions from the 20*s.* (the value of the unbound volume) ought to be made in respect of their overhead and other expenses, such as advertising and marketing. In my opinion, they are not entitled to have

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any such deductions made. These expenses were incurred in connection with the volume as a whole and there is nothing to suggest that they would not have been incurred if the infringing matter had never been incorporated in it. The defendants are wrongdoers, and I cannot see any ground, on principle or authority, why an apportionment of these expenses should be made.

In the result, the order of the learned judge ought, in my opinion, to be varied by substituting for the sum of 150*l.* the sum of 494*l.* This sum is arrived at as follows: The agreed number of copies of Volume III of "Modern Practical "Plumber" delivered and sold during the period of six years before writ was 9881. The value of these copies was 21*s.*, from which must be deducted 1*s.* for binding. The proportion of infringing matter was one-twentieth, as found by Crossman J., and accordingly the value of the infringing matter was $\frac{9881 \times 20}{20}$ shillings, i.e., 494*l.* As the total sum recovered exceeds the sum paid into Court, the order as to costs should be varied by giving to the plaintiffs the costs of the action.

ROMER L.J. It is provided by s. 7 of the Copyright Act, 1911, that all infringing copies of any work in which copyright subsists or of any substantial part thereof shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof. It is provided by s. 10 of the same Act that an action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement. The first question to be decided upon this appeal is whether this limit of three years applies to an action by the owner of the copyright in a work to enforce the rights given to him by s. 7.

In order to answer this question it is, I think, necessary to consider in the first place what is meant in s. 10 by "an "action in respect of infringement of copyright."

Now "copyright" for the purposes of the Act is by s. 1, sub-s. 2, defined as meaning the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever and to do the other things that are specified in the sub-section. Sect. 2 of the Act provides by sub-s. 1 thereof, subject to a proviso that is immaterial for the present purpose, that copyright in a work shall be deemed to be infringed by any person who without the consent of the owner of the copyright does anything the sole right to do which is by the Act conferred on the owner of the copyright, that is to say, performs any of the acts that are particularized in sub-s. 2 of s. 1. The person who without the consent of the owner of the copyright does any of these things commits an infringement, even if he does them in ignorance of the owner's rights. But after an infringement has been committed the work produced by the infringer may come into the hands of a third party. It is accordingly provided by sub-s. 2 of s. 2 as follows: "Copyright in a work shall also be deemed to be "infringed by any person who (*a*) sells or lets for hire, or by "way of trade exposes or offers for sale or hire; or (*b*) dis-"tributes either for the purposes of trade or to such an extent "as to affect prejudicially the owner of the copyright; or (*c*) by "way of trade exhibits in public; or (*d*) imports for sale or "hire into any part of His Majesty's dominions to which this "Act extends, any work which to his knowledge infringes "copyright or would infringe copyright if it had been made "within the part of His Majesty's dominions in or into which "the sale or hiring, exposure, offering for sale or hire, dis-"tribution, exhibition, or importation took place."

It is plain from this that, if a person who has not himself infringed the copyright within the meaning of sub-s. 1 innocently sells or exposes or offers for sale an infringing work, he does not thereby commit an infringement of copyright. The infringing work sold, or exposed or offered for sale, would, however, by virtue of s. 7 be deemed to be the property of the owner of the copyright, and such owner could take proceedings for the recovery of the possession thereof or in respect of any conversion thereof. Consider now the case of an importer into this country, otherwise than for sale or hire, of a work which does not in fact infringe copyright but which would infringe copyright if it had been made within the United Kingdom, such importation being made in breach of the provisions of s. 14. In such a case there has not been any infringement of copyright by anybody. The imported work nevertheless becomes the property of the owner of the copyright by virtue of s. 7, and such owner could take proceedings against the importer to recover possession of such work. For the work would be an "infringing" copy within the meaning of s. 7 by virtue of the definition of "infringing" in s. 35. But in neither of the cases that I have mentioned could the action taken by the owner of the copyright under s. 7 be properly called an action for infringement of copyright within the meaning of s. 6, sub-s. 5, of the Act, for in neither case will the defendant have committed an infringement. But would the action in either case be an action in respect of infringement of copyright within the meaning of s. 10? In the case of an action against a person who has (say) innocently sold or imported a work that has been produced by a third party in infringement of copyright, the owner of the copyright would in an action for conversion have to prove the fact of infringement, and to that extent the action might perhaps be said to be one in respect of an infringement. But in the case of an action brought against a person to recover possession of or damages for the conversion of a work imported by him into the United Kingdom which does not in fact infringe copyright but merely would infringe copyright if it had been made within the United Kingdom, it would in my opinion be impossible to describe such action as proceedings in respect of infringement of copyright, even though the importation were made in breach of the provisions of s. 14 of the Act. It seems highly improbable that the Legislature intended one period of limitation to apply to an action under s. 7 when infringement has in fact taken place and another period to apply to an action under the section when no infringement has been committed. This consideration alone induces me to doubt whether by the reference to an action in respect of infringement of copyright in s. 10 it was intended to cover an action under s. 7 of the Act. My doubt is confirmed by this further consideration. The term of three years mentioned in s. 10 runs from the date of infringement. In a case therefore of an action for conversion against a person who innocently sells an infringing copy, the plaintiff's claim will, if s. 10 applies to such an action, be barred after three years from the date of the infringement, and the infringement in this case must be an infringement by some person other than the defendant who has not committed any infringement himself.

But now take the case of an action against a person who has himself committed an act of infringement by (say) selling a work which to his knowledge infringes copyright. The work so sold may have been printed by one person, published by another, and finally sold by the defendant. The plaintiff in the action is entitled to recover damages against the defendant for his infringement of copyright by selling. He is also entitled to recover damages against the defendant for conversion. The action, regarded as a whole, is undoubtedly an action in respect of infringement of copyright. But there have been three infringements committed by three different people, two of whom are not parties to the action. Do the three years run from the infringement by the defendant or the infringement by the printer or the infringement by the publisher ? And even if in such a case it runs from the defendant's infringement of copyright, from what time does it run in the case of an innocent purchaser from that defendant ? This is a question that I find some difficulty in answering, and the difficulty in answering it makes me think that s. 10 could not have been intended to apply to any claim founded upon s. 7 of the Act. But finally, it is to be observed that s. 8 also refers to proceedings taken " in respect of the "infringement of the copyright in any work." It is there provided that, if in any such proceedings the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work

This section if applied to an action brought solely for the purpose of recovering possession of or damages for the conversion of infringing copies is nonsensical. If it did so apply, the plaintiff would get no relief at all, if the defendant could satisfy the onus thrown on him. For the plaintiff would not and could not, in such an action, be asking for an injunction or interdict in respect of the infringement—and even if the defendant had the fullest knowledge of the existence of the copyright at the time he acquired possession of the infringing copies or converted them to his own use, the plaintiff would be defeated if the defendant could show that he did not possess such knowledge at the date of the infringement, a date that could possess no signification at all as between the defendant and the plaintiff whose property was in the possession of the defendant or had been converted by him.

For these reasons I respectfully differ from the conclusion at which Crossman J. arrived. In my opinion the only Statute of Limitation applicable to the plaintiffs' claim for conversion is that of 21 James I., c. 16.

Upon the other questions arising upon the appeal and the cross-appeal I have nothing to add to what has been said by the Master of the Rolls.

MACKINNON L.J. I regret that on the one point that is material to the fate of this appeal I find myself driven to a different conclusion.

The plaintiffs are the owners of copyright in an original literary work entitled "Heating and Ventilating." They sued the defendants alleging that in the third volume of a work called "Modern Practical Plumber" the defendants had infringed their copyright. By their statement of claim they claimed both damages for infringement and also damages for conversion under s. 7 of the Copyright Act, 1911. The defendants put in a defence admitting infringement, and offering to submit to an inquiry as to damages for infringement, or alternatively as to damages for conversion, impliedly asserting that these remedies under the Act were alternative and not cumulative. Whether that was rightly asserted was discussed as a question of law. Farwell J. decided that the defendants' point was a good one. The Court of Appeal overruled him, and held that the two remedies were cumulative and not alternative, though they pointed out that in assessing the two heads of damage care must be taken that they were not allowed to overlap so as to permit to any extent a double recovery.

The case then came before Crossman J. to assess the damages under the two heads in accordance with the decision of the Court of Appeal. After a hearing that is reported to have occupied ten days the learned judge reserved judgment. Two months later he announced his decision—50*l.* as damages for breach of copyright and 150*l.* as damages for conversion, 200*l.* in all. This the learned judge (surely with an excess of modesty, considering the industry he had expended) described as rusticum judicium.

Under the ingenious modern system by which a judge is not allowed to know that a defendant has paid money into Court, or the amount of such payment, the spice of a gamble may now be added to the joys of litigation. When 200*l.* was announced as the damages found under both heads, counsel for the defendants were able to inform the judge that they had won the costs game, since they had paid 251*l.* into Court, and the defendants got the costs of the action subsequent to the payment in.

It is obvious that by this time the costs of the litigation were far more a matter of importance than any vindication of the originality of the literary work entitled "Heating and "Ventilating." And the plaintiffs had the greatest interest in seeking to establish that 200*l.* for the two sets of damages was too low, and the figures should be at least something above 251*l.* The present appeal was therefore brought. The plaintiffs contend that 150*l.* as damages for conversion was too low and was so because Crossman J. went wrong in the law. He held that by virtue of s. 10 of the Copyright Act, 1911, a claim for damages for conversion under s. 7 was subject to the limitation of three years. The plaintiffs say this is wrong, since s. 10 does not apply to a claim under s. 7.

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The defendants had appropriated a substantial part of the plaintiffs' original literary work more than three years before the issue of the writ. The learned judge only gave damages for conversion for what they did in those three years. But, if their doings before the three years were taken into account, and the formula accepted by the learned judge for assessing the damages applied, the resulting damages would be considerably more than 201*l.* And if this be added to the 50*l.* damages for breach of copyright, the defendants will have lost the costs game.

The plaintiffs having given this notice of appeal, the defendants delivered a cross notice of appeal. Their contention is that the learned judge went wrong in law in assessing the quantum of damages for conversion. He gave the plaintiffs such proportion of the market value of the defendants' publication, Volume III of " Modern Practical Plumber," as the amount of material filched from the plaintiffs bore to the whole contents of that partly piratical publication. The defendants say this is wrong, and that he should only have given the value of the matter appropriated before its incorporation with matter written by or for the defendants. This obviously would be very small. I suspect that the purpose of this cross-appeal (though the purpose was not avowed) was only to counteract the possible success of the plaintiffs' appeal. If the three-year limit were held not to be applicable, it might still be possible, with the quantum of damage for each appropriation reduced, that the damages for conversion might be kept below the all-important figure of 200*l.*

I turn to the consideration of the plaintiffs' appeal. The Copyright Act, 1911, provides in s. 1, sub-s. 2: " For the "purposes of this Act, ' copyright ' means the sole right to "produce or reproduce the work or any substantial part "thereof in any material form whatsoever." Sect. 2, sub-s. 1: " Copyright in a work shall be deemed to be infringed by any "person who, without the consent of the owner of the "copyright, does anything the sole right to do which is by "this Act conferred on the owner of the copyright." Sects. 6 to 10 are included under a cross-heading, " Civil Remedies." Sect. 6, sub-s. 1: " Where copyright in any work has been "infringed, the owner of the copyright shall, except as other-"wise provided by this Act, be entitled to all such remedies "by way of injunction or interdict, damages, accounts, and "otherwise, as are or may be conferred by law for the infringe-"ment of a right." Sect. 7: "All infringing copies of any "work in which copyright subsists, or of any substantial part "thereof, and all plates used or intended to be used for the "production of such infringing copies, shall be deemed to be "the property of the owner of the copyright, who accordingly "may take proceedings for the recovery of the possession "thereof or in respect of the conversion thereof." Sect. 10: "An action in respect of infringement of copyright shall not "be commenced after the expiration of three years next after "the infringement."

The plaintiffs in this case are bringing an action for infringement of copyright. They claim damages for that infringement under s. 6, sub-s. 1. They claim also damages for conversion under s. 7. It is argued that it is only in so far as the remedy claimed is under s. 6, sub-s. 1, that there is an action in respect of the infringement of copyright within the provision of s. 10. But in so far as in this action the remedy claimed is under s. 7, this is not "an action in respect of infringement "of copyright" within s. 10, and as regards the part of the claim for that remedy the limitation of three years in s. 10 does not apply.

I cannot accept this contention. I think that the limitation of three years in s. 10 does apply to the remedy claimed under s. 7. With the reasons given by Crossman J. for coming to that conclusion I am not sure that I quite agree. He seems to have said that in this case the plaintiffs were undoubtedly bringing an action in respect of infringement of copyright. For they were claiming damages under s. 6, sub-s. 1, as well as under s. 7. There is only one action, though two sorts of relief are claimed in it. And as the one action is clearly in part "an action in respect of infringement "of copyright" under s. 10 that action cannot be commenced after the expiration of three years.

With one aspect of this reasoning I do agree. It seems to me that the damages for breach of copyright and damages for conversion are complementary the one of the other, and together make good the totality of the loss inflicted on the owner of an infringed copyright. Speaking broadly, damages for infringement are what a plaintiff has lost by the diversion of his customers to the defendant's publication, while damages for conversion are what the defendant has gained by selling the plaintiff's property. If for breach of his copyright the owner of it has two remedies which together compensate him for the totality of the loss inflicted on him, it seems to me most improbable that the Legislature can have had any reason to fix, or can have intended to fix, one period of limitation (three years) for the damages for breach of copyright and a longer period (six years) for the damages for conversion.

The equivalent of these two-fold remedies was created by the first Copyright Act of 1709 (s. 1), by forfeiture of pirated copies, and a penalty of one penny for every sheet. Sect. 10 provides a limitation of three months for both remedies. So in the Act of 1842, s. 15 provided the remedy of damages for breach of copyright, and s. 23 that for detention or conversion, while by s. 26 the period of limitation for both was twelve months. In view of this historical background it would be the more surprising that in 1911 the Legislature should have intended that the period of limitation should apply to only one of the two sorts of relief.

The reasoning of Crossman J. would afford no solution of the problem if the plaintiffs had not claimed an injunction, and had not claimed damages under s. 6, sub-s. 1, but had only claimed damages under s. 7. If this had been so I should still be of opinion that s. 10 would apply to impose a three years' limitation to their claim.

In an action in that form the plaintiffs must plead that they are the owners of the copyright in their book, that the defendants had infringed it, and that therefore the plaintiffs were entitled to damages under s. 7. This would clearly be "an action in respect of infringement of copyright," though the remedy claimed was only damages for conversion given by the statute as one of the remedies for such infringement.

Sect. 7 opens with the words "All infringing copies." The adjective necessarily involves that each copy is "an infringe-"ment." Of what is it an infringement? I think clearly an infringement of copyright, which is the subject-matter of the statute. The words continue "All infringing copies of any "work in which copyright subsists." In truth they might as well be "All copies which infringe the subsisting copyright "of any work." And if that be so, a claim under s. 7 seems to be clearly "An action in respect of infringement of copy-"right" within s. 10.

There is another aspect of this. If "an action in respect of "infringement of copyright" in s. 10 means *only* a claim for damages for breach of copyright, and does not include a claim for damages for conversion, the same special meaning must be given to the words in s. 8, "Proceedings in respect of the infringement "of the copyright in any work." Sect. 8 provides that if in any such proceedings a defendant proves certain things (which incidentally I should think could very rarely be proved) the plaintiff shall not be entitled to any remedy other than an injunction. But if the words in s. 10, and the almost identical words in s. 8, apply only to a claim for damages, under s. 6, sub-s. 1, but do not apply to a claim for damages for conversion under s. 7, then s. 8 would afford the defendant who satisfied its condition no defence to a claim under s. 7. All these sections are under the heading "Civil Remedies." Such remedies are really threefold: (1.) Injunction, (2.) Damages for infringement of copyright, (3.) Damages for conversion. If the appellants' contention is correct, the *effect* of s. 8 is that a defendant who satisfies the condition will be liable for (1.) injunction and (3.) damages for conversion, but he will be relieved of (2.) damages for breach of copyright. It seems an odd way to achieve this result to enact that "the "plaintiff shall not be entitled to *any* remedy other than an "injunction."

So far I have only been considering these sections about Civil Remedies which are directly relevant to this question. But the strength and plausibility of the appellants' argument is derived from another part of the Act. Sect. 14 is headed

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"Importation of Copies." The first sub-section is alone material. Those copies are not to be imported, but outside the United Kingdom it may not be possible to call them "copies that infringe copyright." For they may be created in a place in which s. 2, sub-s. 1, of this Act is inoperative.

Now among the definitions in s. 35 of the Act is this: "'Infringing,' when applied to a copy of a work in which "copyright subsists, means any copy, including any colourable "imitation, made, or imported in contravention of the "provisions of this Act." That has two limbs, "Copies made "in contravention of the provisions of this Act," and "Copies "imported in contravention of the provisions of this Act." This latter must mean copies imported in contravention of the prohibition of s. 14. And some, at least, of copies of which importation is so prohibited may be copies which cannot be said to be in infringement of copyright, because they were produced or reproduced in a place where s. 2, sub-s. 1, has no effect.

Sect. 7 speaks of "Infringing copies." It appears, therefore, that infringing copies may include some copies that are not strictly an infringement of copyright. It may be that it is for that reason that s. 7 speaks of "All infringing copies "of any work in which copyright subsists," instead of the more natural phrase "All copies which infringe the subsisting "copyright in any work."

The argument based on this passage in s. 35 is this. Sect. 7 speaks of "All infringing copies." Some infringing copies, by virtue of the second limb of s. 35, cannot be said to be "Copies infringing copyright." A claim as to such copies under s. 7 cannot be said to be "an action in respect of "infringement of copyright." To such a claim as to such copies s. 10, therefore, cannot apply. And if s. 10 cannot apply to a claim about some infringing copies under s. 7, it cannot apply to a claim as to any infringing copies under s. 7. Therefore, it cannot apply to the present claim.

I agree there is much weight in this argument, and I think the definition in s. 35 does create great difficulty. But I do not think the argument ought to prevail. I am quite sure from a perusal of ss. 6 to 10 that the Legislature must have intended s. 10 to apply to a claim under s. 7 as well as to a claim under s. 6, sub-s. 1. The question is whether the few words of the definition in s. 35 compel me to defeat that intention. I do not think they do. "Infringing copies of any "work in which copyright subsists" clearly postulates that such copies are an infringement of something, and that something, having regard to the whole subject-matter of the Act, must be copyright. The difficulty arising from the later words of the definition—"Infringing copies . . . . means copies "imported in contravention of" s. 14—would not arise if the passage had read "Copies of a work in which copyright "subsists if imported in contravention of s. 14 shall be deemed "to be infringements of such copyright." And considering the affection that the modern draftsman appears to entertain for the word "deem" I am rather surprised that it was not used here.

When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the Legislature. It may even be necessary, and therefore legitimate, to substitute for an inept word or words that which such intention requires. The most striking example of this I think is one passage in the Sea Carriage of Goods Act, 1924, where to prevent a result so nonsensical that the Legislature cannot have intended it, it has been held necessary and legitimate to substitute the word "and" for the word "or." The violence of this operation has, I think, been minimized by saying that in this place the word "or" must be taken to mean "and." That is a cowardly evasion. In truth one word is substituted for another. For "or" can never mean "and".

It appears to me that having regard to the various passages to which I have referred some violence of interpretation must be applied somewhere to this Copyright Act, 1911. To say that s. 10, having regard to its language, and to its position

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at the end of the five sections as to Civil Remedies, has no application to s. 7, and that s. 8 must have the strange effect I have indicated, seems to me to involve a high degree of violence. I think much less violence is involved if the last few words of the definition in s. 35 are read as meaning "Copies of a work in which copyright subsists if imported in "contravention of section 14 shall be deemed to be copies "that infringe such copyright."

It results that, in my view, if a claim were made under s. 7 for damages for conversion as to copies made abroad, but imported in contravention of s. 14, the limitation of three years imposed by s. 10 would apply even to that claim. One further point made in argument was the question " What in "such a case can be the date of the infringement from which "the three years are to run ? " I do not see much difficulty in that. I think the answer would clearly be the date of the arrival of the copies in the United Kingdom and I also see that any difficulty in the question would also arise if it were asked with the substitution of " six years," the ordinary period of limitation, for " three years."

One other question, on the claim under s. 7, was debated before Crossman J., namely, what in the circumstances of this case must be taken to be the act of conversion. Under that section the infringing copies are to be deemed to be the property of the owner of the copyright. A manuscript copy would become his property as it was written out. A printed copy would become his property directly it was printed. He is at once entitled to the possession of either. What then is the subsequent act by which he is deprived of the possession of it, so that he may claim damages for conversion in lieu of his claim for delivery up ?

I think it is a mistake to indulge in too much refinement as to this. Crossman J. held that the act was sending the piratical sheets to the binders and ordering them to bind them. But the sheets would still be in the possession of the defendants or their agents, and on a demand from the plaintiffs could be delivered up to them. This might involve cutting the pirated matter from the unbound sheets, or cutting it from the bound volumes, a process which would be the same in kind, though the ease of accomplishing it might vary. In my view, the act which makes any delivery up impossible, and therefore the act which deprives the plaintiffs of the right of possession, is the sale of the volumes by the defendants. But if this, the sale of the volumes by the defendants, be substituted for the sending of the sheets to the binders, accepted by Crossman J. as the act or moment of conversion, I do not understand that it can make any practical difference in the estimate of the damages for conversion at which he arrived.

As to the defendants' cross-appeal, I arrive much more easily at the conclusion that it must fail. I think an illustration may be useful. The 1911 Act for the first time in our copyright legislation made the right of an author in an unpublished work part of statutory copyright, and therefore part of his personal property. Suppose an author says in his will: "I leave to my nephew Thomas my box marked 'A,' "and the manuscripts contained in it, and the copyright in "those manuscripts, and I leave to my nephew Robert my "box marked 'B,' and the manuscripts in it, and the copy- "right in those manuscripts." The only really valuable work he leaves behind him unpublished is a completed novel. He made his will under the belief that the whole manuscript of that was in Box "A" left to Thomas. In fact he is in error. Only the first half is in Thomas's box, and the second half is in Robert's box. The author is not a Stevenson, and Thomas's first half is not a "Weir of Hermiston." The value of the manuscripts owned by each, and of the copyright owned by each, is quite small, say 10*l.* Robert comes to Thomas and says: "I should like to read our Uncle's novel all through. "Will you lend me your half." Thomas lends it to him, to be read only, and returned. Robert copies Thomas's half, adds it to his half and sells the whole to a publisher for 1000*l.*

When Thomas sues Robert for conversion, obviously he ought to recover at least 500*l.* damages. But according to Mr. Henn Collins's argument he ought only to get 10*l.*, the value of his copyright by itself, when it was appropriated.

This illustration also I think helps to show that, as I said above, damages for breach of copyright and damages for conversion are complementary, and together make up the totality of loss inflicted on the owner of the copyright. If the defendant copies the whole of the plaintiffs' work, and sells it at the same price in the same market, the damage under the one head would be practically the same as under the other, but of course the plaintiff cannot get it twice over. If the defendant copies the whole, but in a more expensive form sold at a higher price, then damages for infringement will be small, while damages for conversion will be large. In my hypothetical case of the nephews the damages for infringement would be nominal, but those for conversion very high. Conversely, if the defendant reproduces the whole, but in a cheaper form and at a cheaper price, damages for infringement will be high, but for conversion low.

If the defendant takes not the whole but only part of the plaintiff's work, the question of damages under either head becomes more complicated, and if he does so and reproduces the part mixed up with other matter not taken from the plaintiff, it is more complicated still. That is this case. I think the learned judge applied the right principles, and I see no reason to suppose that he was not perfectly right in assessing 50*l.* as damages for infringement and, assuming the three years' limit applies, 150*l.* as damages for conversion.

In the result, I think both the appeal and the cross-appeal should be dismissed.

SIR WILFRID GREENE M.R. The appeal is allowed with costs: the cross-appeal will be dismissed with costs and there must be a variation in the order as to costs in the Court below.

Appeal allowed and cross-appeal dismissed.

Solicitors for appellants: *White & Leonard & Nicholls & Co.*
Solicitors for respondents: *Oswald Hickson, Collier & Co.*

W. I. C.

In re BRIDGEN.

CHAYTOR *v.* EDWIN.

[1937. B. 2354.]

CLAUSON
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Will—Construction—Bequest of " all my possessions "—Whether whole estate disposed of—Direction to divide " equally amongst all my " relations "—Testatrix a spinster—No nearer relatives than children of deceased sisters and their remoter issue—Ascertainment of beneficiaries—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *Part IV.*

By her will, made in 1930, a testatrix, a spinster, directed " all " my possessions to be held in trust after my death and divided " equally amongst all my relations " :—

Held, (1.) that the terms of the will created no intestacy, but constituted an effective disposition of the whole of the property of the testatrix.

(2.) that, as in wills made before the Administration of Estates Act, 1925, the Court adopted a rule of convenience whereby the term " relations " was construed as meaning the persons other than a husband or wife who on an intestacy would have taken under the Statute of Distributions, so in wills made since that Act the term should be construed as meaning those persons who on an intestacy would actually have taken under Part IV. of the Act in the circumstances of each case and not as including the whole class defined by Part IV. as potential beneficiaries on intestacy.

(3.) that, accordingly, the estate should be divided in equal shares per capita among the persons who would have been entitled under Part IV. of the Act if the testatrix had died intestate.

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The testatrix, Emily Bridgen, a spinster, died on February 12, 1930, having made a will, dated February 8, 1930, in the following terms : "In case of my immediate decease I wish "Ethel and Hilda Harding to take possession of all my "possessions to be held in trust after my death and divided "equally amongst all my relations." The persons named having renounced administration, letters of administration with the will annexed were on September 30, 1930, granted to the plaintiff, Avis Chaytor, a niece of the testatrix. The testatrix survived both her parents and had no brothers. She had four sisters, all of whom died during her lifetime.

Reported by F. H. Cowper, Barrister-at-Law.

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There survived her several children of deceased sisters, and in some cases remoter issue.

The plaintiff took out this summons to determine (1.) whether the estate was divisible in equal shares per capita amongst the persons who would have been entitled thereto under Part IV. of the Administration of Estates Act, 1925, if the testatrix had died intestate, or (2.) whether it was divisible as on an intestacy on the footing that the will contained no effective disposition.

The defendants to the summons were Charles Harding, a nephew, and Irene Edwin, a niece, who would benefit more by a distribution per capita than by a distribution per stirpes among the persons who would have been entitled to the estate under Part IV. of the Administration of Estates Act, 1925, as on the footing of an actual intestacy, Alice Brittan, a niece, who would benefit more by a distribution per stirpes than by a distribution per capita, and Olive Chaytor, a daughter of a niece, representing persons who were relations of the testatrix, but would not be entitled to any share of her estate if the persons so entitled were those who would have taken under Part IV. of the Act had she died intestate.

David Jenkins for the plaintiff.

A. H. Droop for the defendants Irene Edwin and Charles Harding. There is no intestacy. "All my possessions" means "all my property" and the words are sufficient to dispose of the whole estate. Before 1925 "all my relations" meant such relations as were capable of taking within the Statute of Distributions: *Widmore* v. *Woodroffe* (1), Sugden on Powers, 8th ed., p. 653. Since 1925 the term "relations" must be construed as meaning such persons as would have been entitled on an intestacy under Part IV. of the Administration of Estates Act, 1925.

G. E. Strickland (*R. W. Goff* with him) for the defendant Alice Brittan. The words of the will are too vague and must produce an intestacy, the gift being void for uncertainty.

(1) (1766) Amb. 636.

A. G. N. Cross for the defendant Olive Chaytor. The term "relations" prima facie extends to all degrees of relationship, but to prevent bequests to "relations" being void for uncertainty the Court adopted the rule of convenience that such a gift was equivalent to a gift to the statutory next of kin: Hawkins on Wills, 3rd ed., p. 135. The Courts realized that this construction probably cut down the intentions of the testator, but they ascertained the meaning of the term by reference to the Statute of Distributions, because if they had gone beyond it there could have been no limit to the scope of the inquiry: *Green* v. *Howard.* (1) By the Administration of Estates Act, 1925, the Legislature has recognized a class of persons as capable of taking on an intestacy which it had not recognized before. This class is confined within the relatively narrow limits of grandparents and descendants of grandparents. The reason for the earlier rule of convenience has thus been destroyed and the Court should now adopt a new rule including within the meaning of the term "relations" all the persons now recognized as potential beneficiaries, not confining it to those persons who would actually have taken on an intestacy in the circumstances of each case.

Droop in reply. For a hundred and fifty years the Courts applied the rule of convenience that a gift to "relations" meant a gift to those persons, excluding a husband or wife, who would have taken under the Statute of Distributions on an intestacy, the reason being that an inquiry extending to all persons with whom there was a nexus of blood would be infinite: *Widmore* v. *Woodroffe.* (2) The persons included were those who would actually have taken. Even had the Administration of Estates Act, 1925, been in force when that rule of convenience was adopted, it would still have been necessary to adopt such a rule. Under the established rule the inquiry stopped at a certain point, but under the rule now suggested it would be necessary to work out all the descendants of all the four grandparents. Such a class is enormous, and often the whole estate would be frittered away

(1) (1779) 1 Bro. C. C. 30. (2) Amb. 636, 640.

in pursuing the inquiry. The necessity for a rule of convenience has not disappeared. The term " relations " should be construed as meaning those persons who would actually have taken under Part IV. of the Administration of Estates Act, 1925, on an intestacy.

Strickland in reply. The old rule was that " relations " meant such persons as would have been called to the succession had the testator died intestate. Those persons did not take under the Statute of Distributions though they were ascertained by reference to it. So now the persons within the class of " relations " would not take under the Administration of Estates Act, 1925. They should be those persons who would have been called to the succession in the event of intestacy.

CLAUSON J. The testatrix, who was a spinster, made her will in these terms : " In case of my immediate decease, I "wish Ethel and Hilda Harding to take possession of all my "possessions to be held in trust after my death and divided "equally amongst all my relations." Ethel and Hilda Harding renounced administration, which has been granted to the plaintiff.

I am asked to decide what is the effect of this clause, the first point being whether it is a general universal gift of all that the testatrix could bequeath or devise by will. In my view, it is. By this clause the whole of the testatrix's property was disposed of ; and there is no intestacy.

Next I have to decide who are the beneficiaries who take. I will first treat the question as if I were dealing with it before the recent change in the law effected by the Administration of Estates Act, 1925. If I had then been dealing with it my decision would have been as follows. I should first have held that there was no special virtue in the phrase "all my relations " and that this phrase did not bring in any more extensive class than would the words "my relations." I should next have decided what the phrase "my relations " meant. By reason of authorities, to which it is not necessary for me to refer, but which are clearly binding upon this

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Court, I should then have decided that the persons who took under this gift were the persons, other than a husband or wife, who would have been entitled to the personal estate of the deceased by virtue of the Statute of Distributions, had there been an intestacy. If the Court were to read a gift to "relations" as covering everybody between whom and the testator or testatrix there was a nexus of blood, the result would be to embark upon an inquiry which, at all events in the vast majority of cases, would, as pointed out by Lord Camden L.C. in *Widmore* v. *Woodroffe* (1), be infinite. Accordingly, in such cases the Courts adopted the rule that the word "relations" was to be construed as meaning the persons who would have taken under the Statute of Distributions. Under this particular will the distribution is directed to be equal; and, accordingly, before the alteration in the law to which I have referred, the persons entitled under the statute having been ascertained would not have taken in the shares indicated in the statute, but would have taken equally.

The law, however, has been changed by the Administration of Estates Act, 1925, in two respects. The first alteration is that it confines the persons who can take in the case of intestacy to a comparatively narrow class of relatives—namely, those who are within the degrees of grandparents or descendants of grandparents. The other alteration made is this. The persons who take under the Act do not necessarily take absolutely, as did the persons who took under the Statute of Distributions; but such of them as are infants take subject to certain contingencies.

What effect must that alteration in the law have upon my decision of this case? In my judgment, whereas before the alteration in the law I should have had to seek the persons who would take under the Statute of Distributions, I must now apply the same principle as before and seek the persons who would take under the Administration of Estates Act, 1925. It has been argued, however, that, as the rule adopted by the Court before the change in the law was one of convenience only, I can now adopt another rule of convenience

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(1) Amb. 636, 640.

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suggested by the terms of the Administration of Estates Act, and define the word "relations" by reference not necessarily to those who would take under the statute in the case of intestacy, but to the whole of the limited class of relations recognized by the Legislature now as potential beneficiaries of the intestate—namely, those within the degrees of grandparents or grandparents' descendants. It may well be that if it were necessary now to lay down a rule of convenience, it would be appropriate to adopt such a rule as that; but, in my view, I am not free to do so. The rule of convenience which was adopted was that "relations" should be construed as meaning those who would have taken under the Statute of Distributions had there been an intestacy. The change in the law, while it has the effect of substituting a new class in certain respects, ought not, in my view, to be taken as altering that rule beyond strict necessity. I do not see my way to adopt a new rule of convenience—namely, that the term "relations" should be construed as referring to the persons within the degrees of consanguinity indicated in the Act as constituting them possible beneficiaries in the case of intestacy.

In this particular case no difficulty arises by reason of the fact of any claimant entitled to benefit being a minor. All such persons are adults and, accordingly, there does not arise the further question whether, in the case of distribution among the relations equally, those who, under the Administration of Estates Act, 1925, could take only contingently would take the benefit conferred on them by the will contingently or absolutely and it is better that I should not prejudge that point.

I, therefore, declare that upon the true construction of the will and in the events which have happened the estate of the testatrix must be divided in equal shares per capita among the persons who would have been entitled under the Administration of Estates Act, 1925, if she had died intestate.

Solicitors: *Clarke, Rawlins & Co., for Waldy & Son, Darlington; Ravenscroft, Woodward & Co.*

F. H. C.

TRIPLEX SAFETY GLASS COMPANY *v.* SCORAH.

[1937. T. 329.]

FARWELL J.

1937
Nov. 5, 8.

Employer and Employee—Express clauses in contract as to inventions unenforceable—Discovery or invention by employee in course of his employment—Employee trustee for employer—Invention patented by employee after he left his employment—Patent property of employer.

Where an employee makes an invention or discovery in the course of his employment and in doing that which he was engaged and instructed to do, during the time of his employment, and during working hours, and using the materials of his employers, there is an implied term in his contract of service that such invention or discovery becomes the property of his employers, and such an implied term is not excluded by the fact that the express terms of the contract relating to inventions and other matters are unreasonable and unenforceable. In such circumstances, where the employee has made an invention or discovery in the course of his work, the employee becomes a trustee of that discovery or invention for his employers, and he remains such a trustee after he has left their employment, and he is bound to give the benefit of any such discovery or invention to his employers.

WITNESS ACTION.

Under a written agreement, dated November 16, 1929, the plaintiff company agreed to employ the defendant as assistant chemist for a period of three years, commencing as from May 1, 1929. Clause 4 of the agreement provided: "The assistant chemist shall also at all times use his best "efforts to keep himself continuously informed of and "acquainted with all matters pertaining to safety glass of "all makes and the manufacture thereof and at all times "when required by the company he shall give to the company "or their agent or agents all such available information as "may be required of him and this whether verbally or in "writing, and the assistant chemist shall attend at any place "for purposes of experiments, demonstration, consultation or "conferences as may be from time to time requested by the "company." Clause 5 provided: "The assistant chemist shall "take all due precautions to keep secret and shall himself "keep secret all records, knowledge or information that shall "come into his possession which may be of value in the "manufacture of safety glass and shall take the like precautions "to prevent such records, knowledge or information from "passing into the possession of any person or persons or "company not expressly authorized in writing by the company "to receive them." Clause 6 provided: "The said records, "knowledge or information gleaned or discovered by the "assistant chemist shall be the exclusive property of the "company and any new application thereof that shall be "conceived by or become known to the assistant chemist "as applicable to 'Triplex' or safety glass processes and "methods shall be communicated fully forthwith by him "to the company or as the company shall direct. The "assistant chemist shall at the expense of the company take "all such steps and do all such acts and things as the company "may consider necessary and require to vest any patents "when granted in the company and to enable the company "to derive the full benefit of any or all of such information "or inventions, patents, protections or improvements as shall "be derivable therefrom." Clause 7 provided: "In the event "of any patents being taken out in the name of the assistant "chemist with or without any other names, the assistant "chemist shall thereafter at the request and cost of the "company transfer the same to the company or as the company "shall direct." Under clause 9 the defendant agreed with the company not to enter the employment of nor to act as chemist to any individual firm or company manufacturing or contemplating the manufacture of safety glass within a period of one year from the date of his leaving the employ of the company and not at any time to make disclosure of his knowledge of "Triplex" processes to any individual firm or company. That agreement was extended for further periods until the defendant finally left the company's employ early in 1934.

In March, 1932, the defendant was instructed by a Mr. Wilson, the company's head chemist, to discover, if he could, a method of producing what was known as acrylic acid. He did discover the method, in the course of his employment, during the company's hours and using the company's materials. That appeared in a report made by Wilson to the company's board on March 15. The company took no steps to patent the discovery or do anything in the matter while the defendant was in their employ, although the defendant suggested that it might be used as an adhesive in the manufacture of safety glass. The company were manufacturers of safety glass, chiefly used in motor-cars. Shortly after the defendant left their employ in 1934 he set up on his own account as a manufacturer of laboratory glass. Towards the end of 1934 he discovered that acrylic acid could be used as an adhesive for his own purposes as a manufacturer of laboratory glass, and on January 15, 1935, he applied for a patent to protect the discovery he made in 1932. The patent was granted and, according to the specifications, it was for the protection of the discovery made in 1932 and for its use as an adhesive. Subsequently the plaintiffs attempted to patent the discovery and they learned that a grant had already been made to the defendant. They then got into communication with the defendant and requested him to assign the patent to them, offering to pay his expenses in patenting the invention and to allow him a free licence to use the discovery for all purposes of his own, except for the making of safety glass. This the defendant declined to do. The plaintiffs then commenced this action, in which they claimed a declaration that they were entitled to the letters patent granted to the defendant and that he held them as trustee for the plaintiffs and an order that the defendant should forthwith assign such letters patent to them. They also claimed all profits made by the defendant as trustee and payment of any sum found due thereon.

L. F. Heald K.C. and *Basil Drewe* for the plaintiffs. The plaintiffs are entitled to the relief which they claim under the express terms of the contract; but, apart from this, it is well settled law that any invention made by an employee in the course of his employment, in doing that which he was employed to do, during working hours and using the materials of his employers is the property of the employers: *Bloxam* v. *Elsee.* (1) Such a term is implied in the contract for service: *Robb* v. *Green.* (2)

R. A. Willes for the defendant. Clauses 5, 6, 7 and 9 of the contract contain express provisions relating to the duties of the defendant as regards discoveries and inventions by him, and this excludes any implied term. These clauses are far too wide, and the Court will not enforce them. Where the express terms of the contract are unenforceable, the Court will not imply other terms which might have been reasonable. The Court cannot imply a *Robb* v. *Green* (2) covenant into the wreck of an illegal contract, which attempts to provide, in terms which are unenforceable, the very prohibition which it is sought to imply.

In any case the defendant having communicated the discovery to the plaintiffs several years before he left their employment, and they having taken no steps during that time or for a considerable time afterwards to patent or protect the discovery in any way, it is inequitable now for them to claim the ownership of the patent taken out by the defendant.

Heald K.C. replied.

FARWELL J. The first way in which the plaintiffs put their case is that they say it is a matter of express contract, and that under the contract of service the defendant was bound by its terms to do what they asked him to do—namely, to assign to them the benefit of the patent as being a discovery made by him while he was in their employment. With regard to that, Mr. Willes has addressed to me an extremely interesting argument, and his contention is that this contract of service is too wide to be enforceable. The principles which are applicable in cases of this kind are now settled by decisions of the House of Lords, and they may be stated quite shortly in this way: prima facie, every contract made between an employer and an employee which is in restraint

(1) (1825) 1 C. & P. 558, 567.

(2) [1895] 2 Q. B. 315.

of trade is illegal as against public policy, and not enforceable in these Courts, and the onus is on the employer to show that it is a contract which can be enforced because the restraint imposed is not more than is reasonably necessary for the proper protection of himself and his business and is not injurious to the public as a whole. Unless the employer can show both these things, then the contract, so far as it is a contract in restraint of trade, is not enforceable. There is this further to be remembered; whether restrained by express contract or not, no employee is entitled to filch his employer's property in whatsoever form that property may be, whether it is in the form of a secret process or in some other form. On the other hand, no employer is entitled to prevent his employee from making use, in the service of any persons or on his own account, of any experience or skill which the employee has gained during his term of service with the employer. It would obviously be injurious to the public that a man who has acquired in the workshops or the laboratories of an employer any skill or general knowledge of his trade, as distinct from any information which was the property of the employer, should not be entitled to make use of that after he leaves that employer's service, and, therefore, any contract which attempts to prevent him making use of such skill or knowledge is not enforceable.

Bearing those principles in mind, and looking at this contract, it is extremely difficult to see how the contract can be construed so as to bring it within the limits which the law allows. In para. 4 of the agreement an obligation is placed upon the employee to keep himself informed of and acquainted with all matters pertaining to safety glass of all makes and the manufacture thereof and at all times when required to give the company such available information; so that it is his business, amongst other things, to find out—of course, not by illegal methods, but in so far as he can legally by reading technical or trade papers or attending lectures or in any other way—any information available with regard to the manufacture of safety glass, and that he has to communicate to the employer. That information would include information which was open to the public—information which he acquired, as I have suggested, by reading technical papers and finding in a technical paper suggestions, possibly useful suggestions, with regard to the making of safety glass. It would be his duty to communicate that to the company; but any attempt by the company, because he communicated to them information which he had acquired in that way, to restrain him except in their service from making use of the information so acquired, would be going beyond that which the law permits, and if these covenants are so wide that they do seek to impose upon the employee first of all an obligation to acquaint himself with all the various methods of making safety glass which are known or may be known by or are available to the public at large, and then to prevent him making use of information so acquired after he has ceased to be in the employment of the company, they are intended to effect exactly what the law will not permit—namely, to prevent the employee using information which he has acquired while in the employment of the company, but which is not in any proper sense the property of the company.

When I read para. 6 of this contract it seems to me that the company is seeking to do that which the law will not allow, because the contract provides that " the said "records, knowledge or information gleaned or discovered by "the assistant chemist shall be the exclusive property of the "company." That seems to me to be far too wide, and not to be a term of the contract which this Court could possibly enforce; and, if that be so, it seems to me impossible to say that this contract is one which the Court will recognize, and that, therefore, so far as the action is an action founded on the express contract, it cannot succeed.

That leaves me to deal with the question how far there may be an obligation on the defendant to do that which the plaintiffs asked him to do, apart from the express contract altogether. As far as that is concerned, the first ground on which the defendant seeks to avoid that conclusion is by saying that where there is an express contract containing terms which are not enforceable for any reason, the

Court will not imply terms, because the Court will assume that all the terms were in the written document, and that, therefore, there is no room for any implication as to other terms; and it is said that, this provision in the contract not being enforceable, there cannot be any implied term in the contract arising from the employment under which the defendant is under any obligation to do that which he is asked to do here. No doubt to some extent the contention that an express contract excludes any implication is well founded, but I do not think it can be taken to the lengths to which Mr. Willes has invited me to go. As I suggested in argument, it cannot be that merely because a servant covenants in his contract of service to behave properly and honestly towards his employer, and that contract of service happens to be too wide to be enforceable, that he is thereby entitled to be as dishonest and to act as unfairly as he pleases towards his employer. That obviously could not be so. In a case of this sort it is a term of all such employment, apart altogether from any express covenant, that any invention or discovery made in the course of the employment of the employee in doing that which he was engaged and instructed to do during the time of his employment, and during working hours, and using the materials of his employers, is the property of the employers and not of the employee, and that, having made a discovery or invention in course of such work, the employee becomes a trustee for the employer of that invention or discovery, and he is therefore as a trustee bound to give the benefit of any such discovery or invention to his employer, and in my judgment that applies in this case notwithstanding the express contract is not enforceable. Then it is said: If that be so, this employee was permitted, having communicated this discovery to his employers, to leave the employment of the company at the time when the company had made no sort of use of it, or, rather, made no attempt to patent or to protect it in any way; that it was not until he had been out of the employment of the company for some two years that he sought to patent it for his own purposes, and that under those circumstances it would be inequitable for the company now to be allowed to intervene and claim the benefit of this discovery. That argument seems to me to overlook this: it is plainly settled that, once a person is put into the position of a trustee, he cannot avoid the obligations attached thereto, unless the beneficiaries release him either expressly or impliedly. It may be, of course, that in certain cases the Court might be able to imply a release from some special circumstances, but, in my judgment, the mere fact that nothing was done in this matter for some two years is wholly insufficient to enable the Court to imply any such release in this case; and in those circumstances, as in my judgment the defendant became a trustee of this discovery or invention by reason of the fact that he made it while in the employ of the company and during the company's working hours, and in pursuance of the orders of the company's servants, he became a trustee of it for the company, and he has never ceased and cannot have ceased to be a trustee. If that be so, the result must follow that, when the beneficiary calls upon him to assign the property of which he is a trustee to the beneficiary, he is bound to do so, subject only to this; the trustee is entitled to be indemnified against any proper cost to which he has been put in connection with the property of the beneficiary. The trustee is not bound to spend money on the property of another, and he is entitled to be protected against any expenses which he has incurred in protecting that property, but, subject to that, the beneficiary is entitled to call upon the trustee to transfer the property to him, and in this case it seems to me that on that ground the plaintiffs are right in this action, and that the company is entitled now to call upon the defendant to assign to them the letters patent in question, and if necessary I will make a declaration to that effect and make an order upon the defendant to assign the letters patent.

Solicitors for plaintiffs: *Bird & Bird.*

Solicitors for defendant: *Sharpe, Pritchard & Co., for Pepper, Tangye & Winterton, Birmingham.*

P. J. B.

In re HOME GROWN SUGAR, LIMITED.

SIMONDS J.

1937
Nov. 29;
Dec. 7.

[00709 of 1937.]

Company—Winding-up—Shares issued to Minister—Articles of Association—Distribution of surplus assets—Minister to receive a sum equivalent to the amount of dividend on other shares issued to public—Deduction of income tax from previous dividend—Amount calculated after deduction of similar sum representing income tax.

A company formed to develop the sugar-beet industry with the assistance of a Government grant, entered into a contract with the Minister of Agriculture and Fisheries under which the Minister was to subscribe for and be allotted 250,000 shares of 1*l.* each (being one-half of the capital of the company) upon certain special conditions, the principal one being that for a period of ten years the Minister was to receive no dividend, but after that period a dividend of 5 per cent. per annum might be paid to him. Art. 10 of the articles of association provided that in the event of the winding-up of the company any surplus assets were to be applied, firstly, in repayment to the shareholders (including the Minister) of the issued capital; secondly, in payment to the Minister or his nominees of a sum equivalent to the amount of dividend on the shares issued originally to the public, less the amount of dividend received on the shares held by the Minister or his nominees. The company having gone into voluntary liquidation and there being surplus assets for distribution:—

Held, that the sum so payable was not the gross amount of the dividend before deduction of tax but the net amount actually received by the shareholders other than the Minister, after deduction of the appropriate amount of income tax.

In re Dominion Tar & Chemical Co., Ld. [1929] 2 Ch. 387 distinguished.

SUMMONS IN WINDING-UP.

Home Grown Sugar, Ld., was incorporated in 1920 with a nominal capital of 1,000,000*l.* divided into 1,000,000 shares of 1*l.* each, with the object of cultivating sugar beet and particularly to develop the undertaking of British Sugar Beet Growers Society, Ld. The articles provided that the company should enter into agreements with the society and with the Minister of Agriculture and Fisheries. On March 3, 1920, an agreement was entered into between the Minister of Agriculture and Fisheries and the company under which the Minister was to apply for a number of Ordinary shares equivalent to the number allotted to the general public, but not exceeding 250,000 in all. He undertook to pay sufficient moneys to the company to guarantee a dividend of 5 per cent. on the shares allotted to the public during a period of ten years, known as the " development period," and to deduct and account to the Commissioners of Inland Revenue for income tax on any moneys so agreed to be paid. The company agreed to issue "profit notes" to the Minister for moneys so paid. A public issue of the shares was made, and 250,000 were allotted to the public and 250,000 to the Minister.

For some years the company earned no profits, and the Minister paid various sums to the company to enable it to pay the minimum dividend to its shareholders who were members of the general public, but no dividend was paid to the Minister of Agriculture. Profit notes for 32,231*l.* were issued to the Minister, but all such notes had since been redeemed out of profits. In 1923 the capital of the company was reduced to 250,000*l.* divided into 1,000,000 shares of 5*s.* each, and the reduction was sanctioned by the Court. At a special general meeting held on September 9, 1936, it was resolved that the company be wound up voluntarily, and two joint liquidators were appointed. The company was solvent and the winding-up resulted from the passing of the Sugar Industry (Reorganization) Act, 1936, and the transfer of the company's undertaking to British Sugar Corporation, Ld. After repayment of the issued capital there were considerable surplus assets available for distribution.

Art. 10 of the company's articles of association provided for the distribution of any surplus assets in a winding-up as follows :—

"In the event of the winding-up of the company while any "shares shall continue to be held by the Minister or his nominees "as aforesaid or there shall be any profit notes outstanding, the "surplus assets of the company available for distribution after "payment of outstanding debts and liabilities shall be divided "as follows : Firstly. . . ." in repayment of the amount paid up on all the issued shares and the nominal amount of any outstanding profit notes. . . . "Secondly : in payment to "the Minister or his nominees (*a*) in respect of each share "held by the Minister or his nominees under the provision "aforesaid of a sum equivalent to the amount of dividend "received on a share of the company issued originally to the "public on the first general allotment of shares less the "amount of dividend received on such share held by the "Minister or his nominees, and (*b*) of any unpaid interest on "profit notes then outstanding calculated from the date of "payment in respect of which they were issued. Thirdly: "The balance, if any, shall be divided rateably and pari passu "between the holders of all such issued shares of the "company as aforesaid in proportion to the capital paid up "thereon."

The question raised by the summons was whether the words in art. 10, "a sum equivalent to the amount of dividend "on a share of the company issued originally to the public" referred to the net amount of dividend actually received by a shareholder after deduction of the appropriate amount of income tax thereon, as was contended on behalf of shareholders other than the Minister, or whether it referred to the net amount so actually received, plus the income tax deducted from the gross dividends in respect of which the payment was made, as was contended on behalf of the Minister. The difference between these sums amounted to 14,110*l.*

C. V. Rawlence for the liquidators.

H. O. Danckwerts for the Minister of Agriculture and Fisheries. The amount of the dividend paid to and received by the shareholders includes the income tax payable by the shareholder, but deducted by the company, and paid to the Revenue by them as the shareholder's agent. No income tax is at present payable upon this distribution, which is one of capital: *Inland Revenue Commissioners* v. *Burrell* (1); but that fact makes no difference to the sum calculated. See *In re Dominion Tar & Chemical Co., Ld.* (2), where in distributing arrears of dividend on Preference shares, on a winding-up, Eve J. held that no income tax ought to be deducted, the

(1) [1924] 2 K. B. 52.

(2) [1929] 2 Ch. 387.

moneys being capital and not income. This case applies to the present one.

Fergus Morton K.C. and *Terence Donovan* for the Midland Machine Trust, Ld., representing shareholders other than the Minister.

The net amount of the dividend, not the gross amount before deduction of tax, is the proper measure of payment. The Minister of Agriculture and Fisheries is entitled to the same sum as he would have received if dividends had been payable to him during the establishment period, i.e., the dividends less tax. The gross amount of dividend paid by the company is not the same as the dividend "received." The word "receive" must be given the same meaning in all parts of art. 10. The point is a different one from that decided in *In re Dominion Tar & Chemical Co., Ld.* (1), where the question was what were the arrears of Preference dividend payable out of surplus assets. The clause in question in that case took effect only in the event of a winding-up, and no income tax was deductible. The decision was on different facts, and has no application to the present case. Art. 5 contains the words "less any sum "or sums which may have been paid by way of dividend on "such shares," and these words must refer to the net and not the gross sums, for they are to be deducted from net sums. This interpretation alone would put the Minister in the same position as a member of the public who had received dividends.

See r. 20 of the All Schedules Rules under the Income Tax Act, 1918, and s. 7 of the Finance Act, 1931, which was passed to set certain doubts at rest, but only so far as the interpretation of the statute was concerned. No argument based on the rule or the section is of any value in construing art. 10 in the present case.

[The following cases were also referred to: *Samuel* v. *Commissioners of Inland Revenue* (2); *Inland Revenue Commissioners* v. *Blott* (3); *Neumann* v. *Inland Revenue Commissioners.* (4)]

Cur. adv. vult.

(1) [1929] 2 Ch. 387.

(2) [1918] 2 K. B. 553, 559.

(3) [1921] 2 A. C. 171, 201.

(4) [1934] A. C. 215, 236.

1937. Dec. 7. SIMONDS J. This is a summons taken out by the liquidators of the company, which is in voluntary liquidation, to determine what are the respective rights of the Minister of Agriculture and Fisheries, as the holder of certain shares of the company, and of the other shareholders, of whom the Midland Machine Trust, Ld., is a representative.

The question arises in this way. The company was incorporated on November 13, 1920, to cultivate sugar beet and acquire and develop all or any part of the assets and undertaking of the British Sugar Beet Growers Society, Ld. On March 3, 1920, an agreement was made, in accordance with the articles of association of the company, between the Minister and the company, whereby the Minister agreed to apply for a number of Ordinary shares of the company equivalent to the number of Ordinary shares allotted by the company to the public, and to pay for such shares in the same way as the public paid for the shares allotted to them, his liability being, however, limited to 250,000 shares. He further entered into certain other obligations with regard to the provision of certain sums, and the issue of so-called profit notes therefor, which it is not material in these proceedings to consider.

The Minister, pursuant to this agreement, applied for and was allotted, and duly paid for, 250,000 Ordinary shares of 1*l.* each of the company. The shares so issued to him were, under the articles of association of the company, subject to certain incidents of a special character by which they were distinguished from the other Ordinary shares of the company. Art. 4 of the articles of association provides that the shares which should "be subscribed for and allotted to the Minister or his "nominees" should, so long as they should be held by the Minister or his nominees, "but no longer," be subject to certain restrictions. They were not to be transferred to any person other than the nominee of the Minister. They were not to confer on the holders a right to attend or vote at any general meeting, except in special circumstances which are stated, and in particular they were not "except as provided "as regards deferred dividend, in the event of transfer at the "call of the directors under the next following article hereof "to be entitled to rank for or receive any dividend or interest "during the establishment period." The establishment period was by the articles defined as being the period of ten years between the date of the incorporation of the company and April 1, 1930, and so that the period between the date of the incorporation of the company and April 1, 1921, should be treated as the first year of the establishment period. The same article further provides that, after the establishment period, the shares to which I have referred were to be entitled to dividend at the rate of 5 per cent. per annum "as here-"inafter provided." Art. 5 further provides that: "The "directors shall be entitled at any time or times, by notice in "writing, to call upon the Minister to sell all or any of the "shares referred to in the preceding article to any person or "persons nominated by the directors as transferee or trans-"ferees thereof at their nominal par value and the Minister "shall thereupon transfer or procure transfer of the share or "shares affected by any such notice to such person or persons."

There is the following proviso to that article, which has some little bearing: "In the event of the directors calling for "a transfer of all or any of such shares under this clause the "company shall, upon or before the completion of the transfer, "pay to the Minister out of its reserve fund, or out of any "other moneys in its hands, available for distribution as "dividend, the following sum by way of deferred dividend, "such sum to be in addition to the par value of the share or "shares to be paid by the proposing purchaser thereof as "hereinbefore provided—namely, a sum equivalent to dividend "or interest (less income tax) at the rate of 5 per cent. per "annum, calculated from the date of the allotment of the "share or shares to the date of transfer, but in the event of "such transfer taking place after the termination of the "establishment period, less any sum or sums which may have "been paid by way of dividend on such shares, subsequent to "such termination under the provisions in that behalf herein-"after contained." It is to be noticed that the words "less "any sum or sums which may have been paid by way of "dividend on such shares" must refer to the net sums actually paid by the company and received by the Minister, for they are sums which are to be deducted from sums calculated as the net sum—that is, after deduction of income tax.

Art. 8 provides for the application during the establishment period of the net profits available for distribution. It is sufficient to say that during this period no dividend was to be paid in respect of the shares held by the Minister. Art. 9 provides for the application in the establishment period of the net profits available for distribution so long as any shares are held by the Minister, or any profit notes are outstanding. Here it is sufficient to say that during this period the Minister's shares were on exactly the same footing as the other shares of the company.

Art. 10 is the article which has given rise to these proceedings. It provides: "In the event of the winding-up of the "company while any shares shall continue to be held by the "Minister or his nominees as aforesaid or there shall be any "profit notes outstanding, the surplus assets of the company "available for distribution after payment of outstanding "debts and liabilities shall be divided as follows": first, in repayment of the amount paid up on all the issued shares and the nominal amount of any outstanding profit notes. "Secondly" (and here are the vital words, which I therefore quote verbatim): "In payment to the Minister or his nominees "(*a*) in respect of each share held by the Minister or his "nominees under the provision aforesaid of a sum equivalent "to the amount of dividend received on a share of the company "issued originally to the public on the first general allotment "of shares less the amount of dividend received on such share "held by the Minister or his nominees, and (*b*) of any unpaid "interest on profit notes then outstanding calculated from the "date of the payment in respect of which they were issued. "Thirdly: The balance, if any, shall be divided rateably and "pari passu between the holders of all such issued shares of "the company as aforesaid in proportion to the capital paid up "thereon."

The company having, as I have said, gone into voluntary liquidation, and there being surplus assets available after

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making the payments which have first to be made, the question has arisen which is thus accurately formulated in the originating summons: "Whether the sum payable under para. "'secondly' of art. 10"—which I have read—"in respect of "each share held by the Minister of Agriculture and Fisheries "or his nominees under the provision therein referred to is a "sum equivalent to the net amount in respect of dividends "actually received by the shareholders on a share of the company issued originally to the public on the first general "allotment of shares less the amount of dividends received on "such share held by the said Minister or his nominee, or a "sum equivalent to the net amount so actually received (less "the amount of dividends received as last aforesaid) plus the "income tax deducted from the gross dividends in respect of "which payment of the same was made." The latter alternative was put forward as the true construction by the Minister, the former by the other shareholders.

The question is purely one of construction of particular words, and I get little assistance from such cases as *In re Dominion Tar & Chemical Co., Ld.* (1), where other and different words had to be construed. The question here is whether in their context the words "the amount of dividend "received," which twice occur in the passage under consideration, and must bear the same meaning on both occasions, mean (*a*) the sums actually received by the shareholders from the company—that is, the amount of dividend after tax has been deducted; or (*b*) the sums which the shareholders would have received by way of dividend from the company if the same dividend had been declared and no tax had been deducted.

In the consideration of those alternatives I cannot, I think, disregard the fact that the obvious purpose of this provision is to equate the shares of the Minister with the shares of the other shareholders, and to make up to him what he has lost by the payment to others and the withholding from him of dividends during the establishment period. But if I adopt the view for which his counsel has contended I shall place him in a more favourable position than the other shareholders.

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(1) [1929] 2 Ch. 387.

For it is clear, on the authority of such cases as *Inland Revenue Commissioners* v. *Burrell* (1), that no income tax would be payable in respect of sums so received by him in the winding-up.

Apart, however, from this consideration, it appears to me reasonably clear that the amount of dividend received by a shareholder within the meaning of this clause is that sum which he actually receives after the company has exercised the right to deduct the appropriate amount of tax, which is given to it by r. 20 of the All Schedules Rules of the Income Tax Act, 1918.

It is no doubt true that, for some statutory purposes, the whole of the dividend is to be regarded as the shareholder's income, notwithstanding that he actually receives only part of it. So, also, it is true that if, a dividend having been declared, the company deducts from the dividend the appropriate amount of tax which it has previously paid, such payment may be said to operate in relief of the shareholder see per Lord Cave in *Inland Revenue Commissioners* v. *Blott* (2), and per Lord Wright in *Neumann* v. *Inland Revenue Commissioners.* (3)

But it does not, in my view, follow that the shareholder is, for the purpose of such an article as this, to be regarded as receiving what he does not in fact receive. Such a contention would be weightier if the shareholder, being entitled to receive the whole dividend, directed the company to pay the appropriate part of it as income tax on his behalf. But that is not the position. Indeed, so far is it from being the position that the company itself decides whether it will or will not deduct tax from dividend, and will be guided in the amount of dividend which it declares by its decision to deduct or not to deduct tax. It was suggested that since, in the proper case, a shareholder is entitled to recover back from the Crown the tax deducted from his dividend, the whole dividend, and not merely the dividend less tax, should in every case be regarded as "the "amount of dividend" received by the shareholder. I cannot accept this view, for I think that the words in question indicate

(1) [1924] 2 K. B. 52.
(2) [1921] 2 A. C. 171, 201.
(3) [1934] A. C. 215, 236.

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a common standard, and I must, therefore, reject an incident which affects certain shareholders only.

In my judgment the amount of dividend received by the shareholder on his shares within the meaning of this clause is the same thing as the amount of dividend which the company pays to the shareholder, and does not include the amount which the company does not pay to the shareholder but withholds from him. The declaration will be framed accordingly.

Solicitors: *Charles Rogers, Sons & Abbott; Solicitor to the Ministry of Agriculture and Fisheries.*

H. L. L.

QUEEN ANNE'S BOUNTY *v.* TITHE REDEMPTION COMMISSION.

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July 7, 9.

[1937. Q. 918.]

Tithe rentcharge—Recovery of arrears—Sums due under order of county court—Costs—" Arrears "—Tithe Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *s.* 20, *sub-s.* 3.

The term " arrears " in s. 20, sub-s. 3, of the Tithe Act, 1936, is not restricted to sums due on account of tithe rentcharge, in respect of which no order has been made, but includes sums in respect of which an order has been made in the county court in accordance with the procedure in force before the Act of 1936 came into operation.

Costs in connection with the making of such orders, not being sums due on account of tithe rentcharge, do not, however, constitute " arrears " within the meaning of the sub-section.

ADJOURNED SUMMONS.

At all material times up to April 1, 1937, Queen Anne's Bounty were owners within the meaning of s. 20, sub-s. 3, of the Tithe Act, 1936, of certain tithe rentcharge charged on certain lands in the parish of Winslow (Bromyard) in the county of Herefordshire. The owner and occupier of the lands in question was, at all material times, Henry Lewis John Rosser.

On November 14, 1934, on an application made in accordance with the Tithe Rentcharge Recovery Rules, 1891, an order was made by the County Court of Hereford for the recovery of 10*l.* 0*s.* 8*d.* in respect of the said tithe rentcharge together with a sum of 7*s.* 6*d.* costs.

On October 21, 1936, a similar order was made for the recovery of 12*l.* 14*s.* 8*d.* in respect of the said tithe rentcharge together with a sum of 7*s.* 6*d.* costs.

At the date of the coming into operation of the Tithe Act, 1936, which was passed for the purpose of extinguishing tithe rentcharge, no part of the sums ordered to be recovered by either of the said orders had been recovered or otherwise discharged.

On April 17, 1937, in accordance with s. 20, sub-s. 3, of the Tithe Act, 1936, a notice in the prescribed form giving particulars of the arrears of the said tithe rentcharge claimed to be recoverable from H. L. J. Rosser was sent to him by Queen Anne's Bounty.

On April 17, 1937, a similar notice giving the same particulars was given to the Tithe Redemption Commissioners—the Commission established by the Act of 1936 for the purposes of that statute.

On April 22, 1937, a letter, dated April 22, 1937, was received by Queen Anne's Bounty from the Tithe Redemption Commission in the following terms:—

" Sir,

"Tithe Act, 1936.

"Section 20.

"I have received the notice dated the 17th April, 1937, which, "under s. 20 (3.) of the Tithe Act, 1936, has been served by "Queen Anne's Bounty upon the Tithe Redemption Commission "claiming that the sums therein specified and described as "' arrears ' are recoverable as arrears from Mr. H. L. J. Rossery "(*sic*) of Drythistle Hill, Winslow, Bromyard.

"It is observed that, with the exception of the last item "(2*l.* 13*s.* 3*d.*) all these sums are the subject of Orders made by "the Bromyard County Court on the 14th November, 1934, "and the 21st October, 1936, respectively.

"I am directed to inform you that the Commission are of "opinion that the sums ordered to be recovered by an order of "the Court are not ' arrears ' within the meaning of s. 20 and, "therefore, are not within the scope of sub-s. 2 and the follow- "ing sub-sections of that section. (1) For this reason, the "Commission consider that (with the exception of the last item "mentioned above) they are not concerned with the sums "specified in the notice ; that no payment by the Commission "to Queen Anne's Bounty under the section can in any event be "expected by you in respect of them ; and that accordingly

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(1) By s. 20 of the Tithe Act, 1936 :—

" (1.) The extinguishment by "this Act of tithe rentcharge shall "not affect any right or liability in "respect of sums which became "due on account thereof before the "appointed day (in this Act "referred to as ' arrears ').

" (2.) On the first day of April, "nineteen hundred and thirty- "seven, power to recover and give a "discharge for arrears shall vest in "the Commission to the exclusion "you should take such steps as you may consider proper for "the recovery thereof."

"of any other person, and the "subsequent provisions of this "section shall have effect with "respect to the recovery thereof "on or after that date.

" (3.) No legal proceedings for "the recovery of arrears of a rent-"charge shall be commenced or "continued by the Commission on "or after the said first day of April "until one month after the person "who would have been entitled to "recover the arrears (in this section "referred to as the 'tithe-owner') "has, by notice in writing served "after that date, given to the per-"son who for the purposes of an "application for an order under "section two of the Tithe Act, "1891, for the recovery of the "arrears would be treated as the "owner of the land out of which "the rentcharge issued (in this "section referred to as the 'tithe-"'payer'), and to the Commis-"sion, particulars in writing in the "prescribed form of the arrears "which the tithe-owner claims to "be recoverable from the tithe-"payer.

" (4.) A tithe-payer upon whom "a notice is served for the purposes "of the last foregoing sub-section "may, within one month after ser-"vice thereof upon him, or within "such extended period as the "Commission may in special cir-"cumstances allow on application "being made to them in that be-"half by the tithe-payer, serve "upon the Commission notice in "writing in the prescribed form "stating that he desires to have "the matter of the recovery from "him of the arrears referred to a "committee (to be called the "'Arrears Investigation Com-"'mittee') which shall be estab-"lished for the purposes of this "section and shall consist of a "chairman appointed by the Lord "Chancellor and two other mem-"bers appointed by the Minister.

" (5.) Where a tithe-payer duly "serves notice on the Commission "claiming to have the matter of "the recovery from him of arrears "referred to the Committee, the "Commission shall refer the matter "to them and shall not commence "or continue any legal proceedings "for the recovery of the arrears "until the matter has been dis-"posed of by them.

" (6.) If the tithe-payer satisfies "the Committee, on a reference to "them under this section, and his "financial circumstances are such "as to render it fair and reasonable "that a part or the whole of the "arrears should be remitted, or "that any order made for the "recovery thereof should provide "for the recovery thereof by in-"stalments, the Committee, after "giving to the tithe-owner an "opportunity of making repre-"sentation, may direct accord-"ingly.

" (7.) Where a tithe-payer serves "notice on the Commission claim-"ing to have the matter of the "recovery from him of arrears "referred to the Committee, he "shall be deemed thereby to "admit legal liability for the pay-"ment thereof, and as soon as the "matter has been disposed of by "the Committee, the Commission "shall pay to the tithe-owner an "amount equal to the arrears in "respect of which the notice was "served, less an amount equal to "any remission directed by the "Committee:

" Provided that this sub-section

Queen Anne's Bounty thereupon took out an originating summons in the matter of the Tithe Act, 1936, for the

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"shall not have effect as respects "any arrears which are irrecoverable by the Commission by virtue "of proviso (*a*) to sub-section (10.) "of this section.

"(8.) As respects any arrears as "to which a tithe-payer does not "claim a reference to the Committee within one month after "service on him of a notice giving "particulars thereof served for the "purposes of sub-section (3.) of this "section, or within such extended "period as may have been allowed "under sub-section (4.) of this section, the Commission shall at the "expiration of that period, unless "they are satisfied, after consultation with the tithe-owner, that "the tithe-payer is not legally "liable for the payment thereof, or "that there is no reasonable prospect of the recovery thereof or of "any part thereof, take all requisite steps, including if necessary the commencement or continuance of legal proceedings, for "the recovery thereof, and pay to "the tithe-owner a sum equal to "the amount thereof in respect of "which the tithe-payer has admitted or admits legal liability or "the court has made or makes an "order for recovery.

"(9.) For the purposes of the "Tithe Act, 1925, sums received "by a tithe-owner from the Commission under this section in respect of any arrears shall be "deemed to be sums received by "him on account of tithe rentcharge for the year in which the "arrears became due, and a proportionate part of any remission "directed by the Committee of "arrears of a rentcharge to which "the provisions of section four of "that Act, relating to sums payable by way of sinking fund payment, apply shall be treated as "attributable to the sum so "payable for that year.

"(10.) The right to recover "arrears vested in the Commission "by this section may be enforced "in any manner in which the right "of the Commission to recover an "instalment of an annuity may be "enforced under section sixteen of "this Act:

"Provided that—

"(*a*)—The provisions of sub-"section (2.) of section ten of the "Tithe Act, 1891 (which provides "that a sum on account of tithe "rentcharge shall not be recoverable under that Act unless "proceedings for such recovery "have been commenced before "the expiration of two years "from the date at which it became payable), shall have effect "in relation to the recovery of "arrears by the Commission "from a tithe-payer, so, however, that in reckoning the "said period of two years time "after the tithe-owner has served a notice for the purposes of "sub-section (3.) of this section "on the tithe-payer, during "which legal proceedings may "not, by virtue of this section, "be commenced or continued, "shall be excluded;

"(*b*)—The Court before which "legal proceedings for the recovery of arrears are taken by "the Commission shall give "effect to any direction given by "the Committee in relation "thereto.

"(11.) A county court by which "directions for the execution of an "order for the recovery of arrears "have been given before the first determination of the question whether on the true construction of the Tithe Act, 1936, and in the events which had happened, the sums of money set out in the notices of April 17, 1937, under s. 20, sub-s. 3, of the said Act constituted "arrears" within the meaning of s. 20 of that statute; and for a declaration that the power to recover and give a discharge for the said sums was on April 1, 1937, and was at the date on which the summons was taken out, vested in the Tithe Redemption Commission.

Sir William Jowitt K.C., *P. E. Sandlands K.C.* and *A. H. Armstrong* for the plaintiffs. The abolition of tithes, effected by the Tithe Act, 1936, was made without prejudice to the right of recovery in respect of arrears due up to the date on which the Act came into operation. The question for the decision of the Court is whether arrears which were the subject of distress orders made by the County Court under the procedure in force immediately before the date on which the Act came into operation are recoverable by the Tithe Redemption Commission as "arrears" within the meaning of s. 20 of the Act.

As soon as the Act came into force the tithe-owner was obliged to hand over to the Tithe Redemption Commission his rights under previous orders of the County Court.

Sub-sect. 11 of s. 20 plainly indicates that arrears are arrears, notwithstanding the fact that an order of the Court has been made for the recovery of the sum in question.

They referred to *Queen Anne's Bounty* v. *Thorne* (1) and *Rawlence and Squarey* v. *Spicer.* (2)

Sir Donald Somervell A.-G., *Sir Terence O'Connor S.-G.* and *Hubert Hull* for the Tithe Redemption Commission. The only interest of the Tithe Redemption Commission is to carry out the duties of the Act of Parliament. The main question is whether the word "arrears" means sums the right in respect

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"day of April, nineteen hundred "and thirty-seven, shall have "power to give such directions as "the Court thinks just and equit- "able for the prevention of in- "justice which might otherwise "arise from the suspension of "proceedings by virtue of this "section on that date."

(1) [1934] 2 K. B. 175.

(2) [1935] 1 K. B. 412.

of which has not been made the subject of an order of the Court or whether it includes sums which have been made subject to an order of the Court.

The subsidiary question arises whether, assuming that the word " arrears " includes rights and liabilities, it does or does not include any costs awarded under that order.

When the section is examined and when its consequences are traced out, it will be found that the words are inapt to cover the cases where an order of the Court has been made.

R. W. Goff for the respondent H. L. J. Rosser. Unless these sums are arrears, sub-s. 4 will not apply to the tithe-payer. Consequently the word " arrears " includes the sums which are subject to an order of the Court.

Sir William Jowitt K.C. in reply.

BENNETT J. This is an originating summons to determine a question of construction arising out of s. 20 of the Tithe Act, 1936, the question being what is meant by the word " arrears " in that section.

I think that, in order to make the point to be decided clear, the best course to take is to read the relevant provisions of the Tithe Act, 1936, and then to state the facts to which that legislation has to be applied.

The plaintiffs are Queen Anne's Bounty and the defendants are the Tithe Redemption Commission, a body established by the Tithe Act, 1936, and H. L. J. Rosser the owner of lands charged with tithe rentcharge.

The Tithe Act, 1936, provides by s. 1: " Subject to the "provisions of this Act, all tithe rentcharge shall be "extinguished on the second day of October, nineteen hundred "and thirty-six (in this Act referred to as ' the appointed day '), "and accordingly as from that day the land out of which any "tithe rentcharge issued immediately before that day shall be "absolutely discharged and freed therefrom."

Sect. 2 provides by sub-s. 1: " Subject to the provisions of "this Act stock (to be called ' redemption stock '), charged by "way of guarantee on the Consolidated Fund and the growing "produce thereof, shall be issued for the compensation of the "persons interested in the tithe rentcharge in respect of the "extinguishment thereof by this Act . . . ."

Sect. 3 provides by sub-s. 1: "Subject to the provisions "of this Act, an annuity (to be called a 'redemption annuity') "shall be charged in respect of the land out of which a tithe "rentcharge extinguished by this Act issued immediately before "the appointed day, for the use of His Majesty, for the period "commencing on the appointed day and ending on the day "preceding the sixtieth anniversary thereof . . . ."

Sect. 4 establishes the Tithe Redemption Commission.

Sects. 5 and 6 deal with the obligation of the owner of the tithe rentcharge to give particulars to the Commission.

Sect. 7 deals with the issue of stock.

Sects. 9, 10 and 11 are machinery.

Sect. 16 provides that an instalment of an annuity payable on any payment date shall be a debt due to His Majesty from the person who is on that date the owner of any land in respect of which the annuity is charged.

[His Lordship then read the provisions of s. 20, as above set out, and continued:] These are all the provisions of the statute which are relevant.

The facts of the case are these: At all material times the plaintiffs, Queen Anne's Bounty, were owners within the meaning of s. 20, sub-s. 3, of the Tithe Act, 1936, of the tithe rentcharge charged on certain lands in the parish of Winslow (Bromyard), in the County of Hereford. Henry Lewis John Rosser was the owner and occupier of these lands. On April 1, 1934, there was a sum of 10*l.* 0*s.* 8*d.*, due to the plaintiffs, being one and a half year's arrears of tithe rentcharge and, in addition to that sum, there was a further sum of 12*l.* 14*s.* 8*d.* due to the plaintiffs for arrears of tithe rentcharge in respect of a period of two years which began on April 1, 1934. On September 27, 1934, the plaintiffs made an application under the provisions of s. 2 of the Tithe Act, 1891, to the County Court of Herefordshire for the recovery of the said sum of 10*l.* 0*s.* 8*d.*, due in respect of the tithe rentcharge for one and a half years, which had become payable on April 1, 1934.

On November 14, 1934, an order was made by the County

Court in these terms: "It is this day ordered that the sum of "10*l.* 0*s.* 8*d.* be recovered together with costs in respect of tithe "rentcharge issuing out of the lands described in the first part of "the schedule to this order due for the period of one and a half "years, and for the purpose of such recovery George E. Jones, "an officer appointed by this Court, shall distrain upon those "lands and also on the lands described in the second part of the "same schedule which are liable to be distrained on under "s. 85 of the Tithe Act, 1836, for the said sum, together with "seven shillings and sixpence for costs and also the costs of "distress, and that for the making of such distress this order "shall be such officer's warrant."

On September 25, 1936, a similar application was made to the County Court for a distress order for the sum of 12*l.* 14*s.* 8*d.* and in respect of that sum, on October 21, 1936, after the day appointed by the Tithe Act, 1936, from which the land was absolutely freed from tithe rentcharge, the Court made an order for recovery thereof by distress and also for the recovery of 7*s.* 6*d.* for costs.

On April 17, 1937, the plaintiffs, as tithe-owners, gave notices to the defendant, Mr. Rosser, and to the defendants, the Tithe Redemption Commission, in accordance with the provisions of s. 20, sub-s. 3, of the Tithe Act, 1936, and in answer to these notices the Secretary of the Commission, on April 22, 1937, wrote to the Secretary of Queen Anne's Bounty this letter. [His Lordship read the letter and continued:]

Upon these facts this originating summons was issued for the determination of the following question. [His Lordship read the summons and continued:] Now the sums specified in the notices include the arrears in respect of which a distress order was made on November 14, 1934, and the sum of 7*s.* 6*d.* for costs, and they also include the arrears for which a distress order was made on October 21, 1936, and the sum of 7*s.* 6*d.* for costs.

Before referring again to s. 20, I desire to refer to s. 2 of the Tithe Act, 1891. Sub-sect. 1 of that section provides as follows: "Where any sum due on account of tithe rentcharge issuing "out of any lands is in arrear for not less than three months, the "person entitled to such sum may, whatever is the amount, "apply to the County Court of the district in which the lands or "any part thereof are situate, and the County Court, after such "service on the owner of the lands as may be prescribed, and "after hearing such owner if he appears and desires to be heard, "may order that the said sum, or such part thereof as appears "to the court to be due, be, together with the costs, recovered in "manner provided by this Act, and tithe rentcharge as defined "by this Act shall not be recovered in any other manner."

Sub-sect. 9 of the same section provides as follows :—

"Nothing in this Act shall impose or constitute any personal liability upon any occupier or owner of lands for the "payment of any tithe rentcharge, or any other sum recoverable "or payable under this Act, and the court shall not, by virtue "of this Act, or of the County Courts Act, 1888, have any power "to imprison any such occupier or owner by reason only of the "nonpayment of such tithe rentcharge or other sum, and shall "in any other case have no other or greater powers of fine "or imprisonment than are conferred by the County Courts "Act, 1888."

The plaintiffs argued on the language of s. 20 that there were vested on April 1, 1937, not merely the arrears of the tithe rentcharge referred to in the two distress orders but also the two sums, each of 7*s.* 6*d.* for costs, and that argument was rested on what is said to be the definition of "arrears" in the first sub-section of s. 20. The argument was that "arrears" means not sums which become due on account of tithe rentcharge on the appointed day, but "any right or liability in respect of sums which became due on account thereof before the appointed day."

On that footing they claim that there were vested in the defendants the Tithe Redemption Commission not merely the tithe rentcharge but the costs. Now "arrears" is not a term of art but a well known word commonly used to describe sums overdue and payable in respect of periods of time—for example, unpaid annuities, unpaid interest, unpaid preference dividends —there is no real difficulty in applying the word "arrears" to sums due and not to rights and liabilities in respect of sums which became due on account of tithe before the appointed day.

The construction which the plaintiffs sought to put on the sub-section is straining the language of it, particularly when you find that the language of sub-s. 1 of s. 20 is a reproduction of the language which you find in s. 2 of the Tithe Act, 1891, and I have no doubt that the word "arrears" in sub-s. 1 of s. 20 refers to the sums which became due on account of tithe rentcharge before the appointed day and not to any right or liability in respect of sums which became due on the appointed day.

On that interpretation it is clear that the sums of 7*s*. 6*d*. were not "sums which became due on account of tithe rent-"charge on the appointed day."

That decides the first question against the plaintiffs.

The second question was whether "arrears" includes sums in respect of which an order for recovery by distress had been made as well as sums in respect of which no order for recovery by distress had been made.

On behalf of the plaintiffs it was argued that the word bore the wider meaning, and on behalf of the defendants, the Tithe Redemption Commission, that it bore the narrower meaning.

In considering the arguments it is, in my opinion, important to notice that the order made by the County Court in no way changes the character of the obligation. It remains an impersonal obligation. There was never any debt due from the tithe-payer to the tithe-owner. It was merely a charge on the land and notwithstanding the order of the Court it remains a charge on the land. All that the order of the County Court did was to enable a particular remedy to be put in force.

It remained after the order an arrear due on account of the tithe rentcharge and there is no language in s. 20 of the Act which shows it to have any other meaning than this. On the contrary, there are provisions in sub-ss. 6, 8 and 11 of that section which I think make it quite clear that, when the section was being framed, it was intended to include not only sums in respect of which no order had been made but also the sums in respect of which an order had been made.

I propose, therefore, to make a declaration that upon the true construction of the Tithe Act, 1936, and in the events which have happened, the sums of money set out in the notice dated April 17, 1937, given by Queen Anne's Bounty to the Tithe Redemption Commission and in the notice dated April 17, 1937, given by Queen Anne's Bounty to the said H. L. J. Rosser under s. 20, sub-s. 3, of the said Act, excepting the two sums of 7*s*. 6*d*., constitute "arrears" within the meaning of s. 20 of the Act; and that the power to recover and give a discharge for the said sums was on April 1, 1937, and is now vested in the defendants the Tithe Redemption Commission.

BENNETT J.
1937
QUEEN ANNE'S BOUNTY *v.* TITHE REDEMPTION COMMISSION.

Solicitors: *Solicitor to Queen Anne's Bounty; Solicitor to the Ministry of Agriculture and Fisheries: Harold Potter, for Abell, Jackson & Reece, Worcester.*

J. L. D.

SIMONDS
J.
1937
Nov. 16.

In re BRITISH GAMES, LIMITED.

(00593 of 1937.)

Company—Voluntary winding-up—Proof of debt—Moneylending transaction—Loan consolidating previous loans and arrears of interest—Fresh loan created without new advance—Contract to be signed "personally" by the borrower—Execution by company—Signature of director and secretary—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-ss.* 1, 2; *s.* 9, *sub-s.* 2*—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 29.

A company which had from time to time borrowed large sums from moneylenders, on December 1, 1936, entered into a contract with the lenders by which the lenders agreed to advance 4950*l.*, the sum then owed for principal and arrears of interest, on the security of a promissory note for 4950*l.* with interest at the rate of 27½ per cent. per annum, repayable as to 1970*l.* by specified instalments, the balance of 2980*l.* with accrued interest to be paid off on February 1, 1937. In default of the payment of any instalment the whole amount was to become due and payable. The memorandum of the contract and the accompanying promissory note were both signed by a director and the secretary of the company "for and on behalf of the company," and the company's seal was not affixed to the contract. The new loan in fact consolidated previous loans and the interest thereon, and the memorandum authorized and requested the lenders to retain the sum of 4950*l.* in repayment of outstanding balances of accounts owing.

The company defaulted in payment of the instalments, and the lenders, having sued them, obtained leave to sign judgment for 4695*l.* 10*s.*, but did not actually sign it. The company having passed a resolution for voluntary winding-up, the lenders lodged with the liquidators a proof for 4804*l.* 19*s.* 8*d.*, balance of principal and interest then due. The liquidator rejected the proof as not being in accordance with the provisions of the Moneylenders Act, 1927, s. 6, sub-ss. 1 and 2, and s. 9, sub-s. 2:—

Held, (1.) that the contract having been duly executed in accordance with the Companies Act, 1929, s. 29, the memorandum was "signed personally by the borrower" in accordance with the Moneylenders Act, 1927, s. 6, sub-s 1, there being nothing in the Moneylenders Act, 1927, prescribing that a moneylending transaction with a company must be perfected by a memorandum under seal.

(2.) that the document showed on its face that the loan of 4950*l.* was a consolidating loan, and therefore the memorandum contained all the particulars required to satisfy the Moneylenders Act, 1927, s. 6, sub-s. 2, notwithstanding that part of the loan might have been or was attributable to interest accrued due on previous loans.

(3.) that the statement accompanying the affidavit verifying the applicants' proof contained all the particulars necessary to satisfy s. 9, sub-s. 2, of the same Act.

B. S. Lyle, Ld. v. *Chappell* [1932] 1 K. B. 691 followed and applied.

Dunn Trust, Ld. v. *Feetham* [1936] 1 K. B. 22 distinguished.

SUMMONS in winding-up.

The company, British Games, Ld. (hereinafter called " the "company "), was incorporated on January 19, 1927, as a private company with a capital of 1000*l.*, with the object of carrying on the business of dealers, manufacturers and merchants. It borrowed money from time to time after 1931 from General and Industrial Finance, Ld., registered moneylenders (hereinafter called " the applicants "), and on December 1, 1936, when it entered into the contract next referred to, owed to the applicants a large sum for principal and accrued interest thereon. On December 1, 1936, the applicants lent the company 4950*l.* upon the security of a promissory note of that date. The memorandum of the contract was contained in a letter of that date from the company to the applicants as follows : " We beg to confirm that we are quite "agreeable to taking up an advance of 4950*l.* from you on "the 1st day of December, 1936, and in exchange signing a "promissory note for 4950*l.* bearing interest at the rate of "27½ per cent. per annum repayable to you at Marcol House, "293, Regent Street, or any other address that may be directed "by one instalment of 50*l.* on the 3rd December, and then "by the following instalments (which were set out in full), "and the balance of 2980*l.* together with the accrued interest "calculated at 27½ per cent. per annum to become due and "payable on the 1st of February, 1937, and if we make "default in payment of any instalment on its due date we "agree that the whole of the outstanding principal shall "thereupon become due and payable together with interest "thereon at the rate of 27½ per cent. per annum. We authorize "and request you to retain the said sum of 4950*l.*, the proceeds "of this transaction, in repayment of the outstanding balances "of our accounts which are owing to you. We agree to lodge "with you post-dated cheques relative to this transaction.

"For and on behalf of British Games, Ld., (Signed) Edgar "Jay, director, G. N. Rainnie, Secretary." Then followed an acknowledgment signed by the director and secretary that they had received a true copy of the memorandum of contract. The promissory note, stating the dates of payment of the instalments of 30*l.* or 50*l.* was annexed to the contract and signed by Edgar Jay and G. N. Rainnie.

The company defaulted in the payment of instalments, and on January 8, 1937, the applicants issued a writ in the King's Bench Division for payment of 4695*l.* 10*s.*, being the balance then due for principal and interest. Leave was obtained by the applicants to sign judgment in default of appearance, but no judgment was actually signed. At a meeting of creditors on February 8, 1937, a resolution was passed that the company should go into voluntary liquidation, and A. O. Miles and A. G. White were appointed joint liquidators. On April 1, 1937, the applicants lodged with the liquidators a proof of their claim for 4804*l.* 19*s.* 8*d.*, balance of principal and interest then due. On August 13, 1937, the joint liquidators rejected the proof on the ground that the memorandum of contract was not in accordance with s. 6, sub-s. 1, of the Moneylenders Act, 1927 (1).

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(1) Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6, sub-s. 1: "No contract for the repayment "by a borrower of money lent to "him or to any agent on his "behalf by a moneylender after "the commencement of this Act "or for the payment by him of "interest on money so lent and no "security given by the borrower "or by any such agent as aforesaid "in respect of any such contract "shall be enforceable, unless a "note or memorandum in writing "of the contract be made and "signed personally by the borrower, and unless a copy thereof "be delivered or sent to the "borrower within seven days of "the making of the contract; and "no such contract or security "shall be enforceable if it is proved "that the note or memorandum "aforesaid was not signed by the "borrower before the money was "lent or before the security was "given as the case may be."

Sub-s. 2: "The note or memorandum aforesaid shall contain all "the terms of the contract, and in "particular shall show the date on "which the loan is made, the "amount of the principal of the "loan, and, either the interest "charged on the loan expressed in "terms of a rate per cent. per "annum, or the rate per cent. per "annum represented by the interest charged as calculated in "accordance with the provisions "of the First Schedule to this "Act."

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The applicants took out this summons to reverse the decision of the liquidators.

The liquidators by their formal rejection of proof stated as their sole ground that the memorandum of agreement was not signed by the borrower (namely, the company) personally as required by s. 6, sub-s. 1, of the Moneylenders Act, 1927, and alleged that the memorandum should have been under the seal of the company.

Subsequently they gave notice that they would rely on two additional grounds, (1.) that there was no sufficient memorandum of the transaction under s. 6, sub-s. 2, of the Moneylenders Act, 1927, alleging that the memorandum was defective in failing to specify the previous accounts with particularity, and that no money passed on December 1, 1936, and there was accordingly no loan, (2.) that the proof was defective for the purposes of s. 9 of the Moneylenders Act, 1927 (1), on the footing that it did not show, by reference to the previous transactions, that part of the sum proved for which represented principal and that part which represented interest in respect of those previous transactions.

H. E. Salt for the applicant company. As to the first of the supplemental grounds of rejection : The memorandum is complete in all respects. The consolidating transaction of December 1, 1936, was a new loan for 4950*l.*, which was at the request of the borrowing company applied in payment off of its old accounts with the lender to the extent of the principal and interest then already accrued due and payable in respect thereof. This sufficiently appears on the face of the memorandum itself and there is no evidence to contradict it. Even if (which is not admitted) money did not actually pass on December 1, 1936, it was not necessary that it should. What transpired would have supported a plea of payment : *B. S. Lyle, Ld.* v. *Chappell* (1), compare *Credit Company* v. *Pott* (2) ; *In re Harmony & Montague, etc., Co. Spargo's* case (3) ; *Parsons* v. *The Equitable Investment Co., Ld.* (4)

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(1) Sect. 9, sub-s. 2: "No proof "of a debt due to a moneylender in "respect of a loan made by him "shall be admitted for any of the "purposes of the Bankruptcy "Act, 1914, unless the affidavit "verifying the debt is accom-"panied by a statement showing "in detail—

"(*a*) the amount of the sums "actually lent to the debtor and "the dates on which they were "lent, and the amount of every "payment already received by "the moneylender in respect of "the loan and the date on "which every such payment "was made; and

"(*b*) the amount of the "balance which remains unpaid "distinguishing the amount of "the principal from the amount "of the interest included there-"in, the appropriation between "principal and interest being "made in accordance with the "provisions of this Act where "the interest is not expressed by "the contract for the loan in "terms of a rate; and

"(*c*) where the amount of "interest included in the unpaid "balance represents a rate per "cent. per annum exceeding "five per cent., the amount of "interest which would be so "included if it were calculated "at the rate of five per cent. "per annum."

As to the second supplemental ground of rejection : Sect. 9 of the Moneylenders Act, 1927, is a bankruptcy provision and can, in common with other bankruptcy provisions and rules, only be imported by s. 262 of the Companies Act, 1929, into a case of the winding up of a company where that company is shown to be insolvent. But assuming that this company is insolvent, then the past transactions behind the consolidating loan may be reopened only for the purposes of s. 1 of the Moneylenders Act, 1900, that is to say where the borrower alleges and proves that those past transactions were in some respect harsh and unconscionable. Here there is not and could not be such an allegation. The Court will not go behind the consolidating transaction for any other purpose : *B. S. Lyle, Ld.* v. *Chappell* (1), as explained in *B. S. Lyle, Ld.* v. *Cassel.* (5) The money " actually lent " within the meaning of s. 9 of the Moneylenders Act, 1927, was here a principal sum of 4950*l.*

As to the primary ground of rejection : It is difficult to see how a company can sign personally or indeed do any act in propria persona. It can no more seal personally than it can sign personally. A company can perform no act whatever

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(1) [1932] 1 K. B. 691.
(2) (1880) 6 Q. B. D. 295.
(3) (1873) L. R. 8 Ch. 407.
(4) [1916] 2 Ch. 527, 530.
(5) C. A., May 23, 1935 (unreported).

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except through its agents or officers: *Ferguson* v. *Wilson* (1). Where an Act of Parliament directs a contract to be *made* in writing it may provide that a company may execute such a contract under its seal: Marine Insurance Act, 1906, s. 24, sub-s. 1. But the Moneylenders Act, 1927 (which requires a contract to be evidenced, not made, by writing), is silent on this point, and the lacuna can only be filled by reference to the general law as enacted prior to the Moneylenders Act, 1927, in s. 76 of the Companies (Consolidation) Act, 1908, and re-enacted after the Moneylenders Act, 1927, in s. 29 of the Companies Act, 1929. This case is covered by s. 29 of the latter Act, sub-s. 1 (*b*) or (*c*) and sub-s. 2 (2), under which the contract is binding on the company when executed on its behalf by its authorized agent or officer. Authority to sign a memorandum of contract does not confer authority to make a contract; per contra authority to make a contract necessarily confers authority to sign any memorandum required to render it enforceable. It is incredible that the Legislature could have intended to put a moneylender in the position that if he lends to a corporate borrower he cannot enforce the contract to repay unless such borrower complies with an impossible stipulation—namely, personal signature.

Leonard Stone for the respondents. The contract should have been executed under seal. A contract which is required to be signed "personally" cannot be signed by some other person as an agent. In cases in which a company is required to do something "personally" the articles of the company should be looked at. Arts. 71 and 76 of Table A of the Companies Act, 1908, apply to this company. Those articles specify the way in which a company is empowered to do something for itself, as distinguished from what it can do by an agent. The power of a company to make a decision is vested in the Board of Directors, and the present transaction, if not under seal, might have been carried through without coming to the notice of the Board at all.

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(1) (1866) L. R. 2 Ch. 77, 89.

(2) Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 29, sub-s. 1: "Contracts on behalf of a company "may be made as follows:—

"(*b*) A contract which if made "between private persons "would be by law required to "be in writing, signed by the "parties to be charged there-"with, may be made on behalf "of the company in writing, "signed by any person acting "under its authority, express "or implied.

Sub-s. 2: "A contract made "according to this section shall be "effectual in law, and shall bind "the company and its successors "and all other parties thereto."

It is precisely such a state of affairs that the Legislature has contemplated in moneylending transactions. This is not a contract made on behalf of a company within s. 29 of the Companies Act, 1929.

[SIMONDS J. The Companies Act, 1929, does not distinguish between acts done by a company and acts done on behalf of a company.]

The Moneylenders Act, 1927, s. 6, sub-s. 2, is imperative and is not affected by s. 29 of the Companies Act, 1929.

Signature by an agent has been construed in cases under the Statute of Frauds and under the Bankruptcy Act, 1914, s. 16. " To be signed by a party " is an ambiguous expression, but signature by a party personally must exclude signature by an agent: *In re Whitley Partners, Ld.* (1); *In re Prince Blücher.* (2) On the other point, whether the memorandum of the contract is sufficient to meet the requirements of the Act, either the transaction of December 3, 1936, settled the old loan, or, if not, the whole account can be reopened. *B. S. Lyle, Ld.* v. *Chappell* (3) was a case of a settled account; here there is nothing to settle the account. See *Dunne Trust, Ld.* v. *Feetham.* (4) The liquidator was right in rejecting the proof.

SIMONDS J. This is an application in the liquidation of a company known as British Games, Ld. The application is to reverse the decision of the liquidators of that company in rejecting the proof of the applicants. The applicants are a company called General and Industrial Finance, Ld., who carry on the business of licensed moneylenders. They had lent money to the company by means of a transaction to which I shall presently refer in detail. In the liquidation of the

(1) (1886) 32 Ch. D. 337.
(2) [1931] 2 Ch. 70.
(3) [1932] 1 K. B. 691.
(4) [1936] 1 K. B. 22.

company they lodged their proof on April 1, 1937, claiming a sum due of 4950*l.*, less certain payments which had been made on account, bringing that sum down to 4688*l.* 9*s.* 2*d.*, together with interest from January 6, 1937, to February 8, 1937, making an aggregate of 4804*l.* 19*s.* 8*d.* That claim was rejected by the liquidators on August 13, 1937, on the ground that the contract of December 1, 1936 (to which I shall presently refer), made between the applicants and the company in liquidation was not signed personally by the company in accordance with the provisions of s. 6, sub-s. 1, of the Moneylenders Act, 1927. When the matter came before the Court, that ground of rejection was supplemented by other grounds which have been fully argued before me: (*a*) that the memorandum of December 1, 1936, does not contain all the terms of the contract in accordance with s. 6, sub-s. 2, of the Moneylenders Act, 1927; and (*b*) that the provisions of s. 9, sub-s. 2 (*a*), of the Act have not been complied with.

The transaction was embodied in and evidenced by a document, the memorandum of contract, dated December 1, 1936. It is addressed to the applicants, the moneylenders, and is in these terms: " Dear Sirs,—We beg to confirm that we "are quite agreeable to taking up an advance of 4950*l.* from "you on the first day of December, 1936, and in exchange "signing a promissory note for 4950*l.* bearing interest at the "rate of 27½ per cent. per annum, repayable to you at Marcol "House, 293, Regent Street, London, W.1, or any other "address that may be directed, by one instalment of 50*l.* on "the 3rd day of December, 1936, and then by the following "instalments"; and the number of instalments, 50*l.*, 30*l.*, 50*l.* and so on, due on dates at short intervals, are set out. The document goes on: "and the balance of 2980*l.*, together "with the accrued interest calculated at 27½ per cent. per "annum, to become due and payable on the 1st day of "February, 1937, and if we make default in payment of any "instalment on its due date we agree that the whole of the "outstanding principal shall thereupon become due and "payable together with interest thereon at the rate of 27½ per "cent. per annum." Then come these words which, in the view which the authorities bind me to take, are of vital importance: "We authorize and request you to retain the "said sum of 4950*l.* the proceeds of this transaction in pay- "ment of the outstanding balances of our accounts which are "owing to you. We agree to lodge with you post-dated "cheques relative to this transaction." That document is signed: "For and on behalf of British Games, Limited," by a director, Edgar Jay, and the Secretary, G. N. Rainnie. There is no doubt that these two men were a director and the secretary of the company respectively at the relevant dates. The promissory note referred to in that memorandum is bound up with it. It is a promissory note which conforms in all respects with the terms stated in the memorandum, and it is signed "For and on behalf of" the company by the same persons.

The memorandum having been signed and the promissory note given, some payments were made in accordance with their terms, but at a date in January default was made. Proceedings were taken to recover judgment, but they were not completed, and the result is that the applicants lodged their proof as creditors in respect of what was due to them under this document. The first ground of objection, as I have said, was that the memorandum did not satisfy the conditions of s. 6, sub-s. 1, of the Moneylenders Act, 1927. That provides, so far as it is relevant for the purpose of this decision, as follows: "No contract for the repayment by a "borrower of money lent to him or to any agent on his behalf "by a moneylender after the commencement of this Act or "for the payment by him of interest on money so lent and "no security given by the borrower or by any such agent as "aforesaid in respect of any such contract shall be enforceable, "unless a note or memorandum in writing of the contract be "made and signed personally by the borrower."

The question is what is the meaning of those words in relation to a contract of moneylending entered into by a limited company. It is argued on behalf of the company that the provisions of that section are not complied with unless the memorandum has been sealed by the borrowing company. On the other hand, it is argued that the provisions of the section are sufficiently satisfied if the memorandum is signed by the proper officers of the borrowing company, persons duly authorized thereunto. It appears to me that for this purpose I must have regard to the provisions of the Companies Act, 1929. Sect. 29, sub-s. 1, of that Act (which was passed two years after the Moneylenders Act, 1927, and which itself embodied the language of s. 76 of the earlier Companies Act, 1908) provided, in relation to the form of contracts of a limited company incorporated under the Act, that " Contracts on behalf of a company may be made "as follows: (*a*) A contract which if made between private "persons would be by law required to be in writing, and if "made according to English law to be under seal, may be "made on behalf of the company in writing under the common "seal of the company." That sub-section does not apply to this case, because there is nothing which prescribes that a moneylending transaction must be perfected by a memorandum made under seal. Sub-sect. (*b*) provides: " A contract "which if made between private persons would be by law "required to be in writing, signed by the parties to be charged "therewith, may be made on behalf of the company in writing "signed by any person acting under its authority, express or "implied." Now it appears to me that this is exactly such a contract. Here the contract, to satisfy the provisions of the Moneylenders Act, 1927, must be signed personally by the person charged therewith. Accordingly, if it is to be made by a company the contract may be signed by a person acting under the authority of the company, express or implied; and sub-s. 2 of s. 29 of the Act states: " A contract made according to "this section shall be effectual in law, and shall bind the "company and its successors and all other parties thereto."

Accordingly, reading as I must read, the provisions of s. 29 of the Companies Act, 1929, into the law relating to moneylenders, I find that the provisions of s. 6 of the Moneylenders Act, 1927, are, in the case of a limited company, satisfied if the memorandum referred to in that section is signed by the persons who are officials of the company and authorized to sign on its behalf. I see no necessity for importing into the provisions of the Moneylenders Act, 1927, the provisions of art. 76 of Table A, under the old Act of 1908, or any provision of Table A under the new Act, so as to make it incumbent on a company borrowing money to affix its seal to the memorandum which is contemplated by s. 6 of the Moneylenders Act. Therefore, so far as that ground of rejection goes, I must reverse the decision of the liquidator.

There then come for consideration the other matters which were not brought to the attention of the liquidators, but which have been argued before me. The first point rests on s. 6, sub-s. 2. That provides: "The note or memorandum "aforesaid shall contain all the terms of the contract, and in "particular shall show the date on which the loan is made, "the amount of the principal of the loan, and, either the "interest charged on the loan expressed in terms of a rate "per cent. per annum, or the rate per cent. per annum "represented by the interest charged as calculated in "accordance with the provisions of the First Schedule to this "Act." Sect. 9, sub-s. 2, provides: "No proof of a debt "due to a moneylender in respect of a loan made by him shall "be admitted for any of the purposes of the Bankruptcy Act, "1914, unless the affidavit verifying the debt is accompanied "by a statement showing in detail—(*a*) the amount of the "sums actually lent to the debtor and the dates on which "they were lent, and the amount of every payment already "received by the moneylender in respect of the loan and the "date on which every such payment was made."

It is argued on behalf of the liquidators that the memorandum which I have read does not comply with the provisions of s. 6, sub-s. 2, because it does not contain all the terms of the contract, and that the proof does not comply with the provisions of s. 9, because there is no statement accompanying the affidavit showing the amount of the sums actually lent to the debtor. As I understand it, the ground of that objection is that it does not sufficiently appear on the face of the document or in the proof that this is in substance a consolidating loan, or perhaps I should say the last of a series of documents recording continuous transactions between the parties, and does not, in particular, reveal that of the sum of 4950*l.*, some part at least, on an analysis, is proved to be owing in respect of interest which had accrued due on previous loans. It seems to me that, consistently with the decision of the Court of Appeal in *B. S. Lyle, Ld.* v. *Chappell* (1), and with a further explanation of that case in an unreported decision of the Court of Appeal given on May 23, 1935, in a case in which the same persons, B. S. Lyle, Ld., were plaintiffs, and one Cassel was the defendant, I must hold that this is a transaction of loan of which a sufficient memorandum has been given to satisfy the statute. I regard the words: " We authorize "and request you to retain the said sum of 4950*l.* the proceeds "of this transaction in payment of the outstanding balances "of our accounts which are owing to you," as being in all respects analogous to the words which were used in *Lyle's* case (1): " I hereby authorize and request you to allocate the "whole of the above advance of 200*l.* in settlement of my "promissory note in your favour dated April 25, 1930." It seems to me impossible to distinguish between the one case and the other, and accordingly I must regard this as a transaction of loan in which, on December 1, 1936, a sum of 4950*l.*, no more and no less, was lent by the one party and borrowed by the other: that is, the principal sum which on that day was lent and was borrowed. Accordingly, if that be true, I find in this memorandum of December 1, 1936, all the necessary particulars to satisfy the provisions of the statute.

My attention was called to a later case in the Court of Appeal (*Dunn Trust, Ld.* v. *Feetham* (2)); but in my view that case is widely different from the one which I have to consider, for there it plainly appeared, I think, on the face of the document, and certainly from the facts which were given in evidence, that a sum of 50*l.* which was purported to be lent was not actually lent at all, and the Court in that case came to the conclusion that it was interest and not principal and should have been so described to satisfy the provisions of s. 15 of the Act.

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(1) [1932] 1 K. B. 691.

(2) [1936] 1 K. B. 22.

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Coming to the conclusion to which I do, on the true construction of this document, it appears to me that this objection also fails, so far as s. 6, sub-s. 2, is concerned, and if it fails with regard to s. 6, sub-s. 2, so also must it fail with regard to s. 9, sub-s. 2, of the Act; for in my view the statement accompanying the affidavit does show the amount of the sums actually lent to the debtor and the dates on which they were lent, and the amount of every payment already received by the moneylender in respect thereof. Accordingly, I must allow the application and direct that the proof of the applicants be admitted to rank for dividend against the company.

Solicitors: *Fielder, Jones & Ball; Baileys.*

H. L. L.

MUSSEN *v.* VAN DIEMEN'S LAND COMPANY.

FARWELL J.

1937 Nov. 22, 23.

[1936. M. 3447.]

Vendor and Purchaser—Payment by instalments—Payment of some instalments—Failure to pay others—Rescission of contract by vendor pursuant to contract—Retention by vendor of instalments paid, pursuant to contract—Not a penalty—Not unconscionable.

By an agreement in writing dated November 2, 1927, the plaintiff agreed to purchase from the defendants land in Tasmania for the sum of 321,000*l.*, the money to be paid by instalments as therein set forth and on dates therein stated. Time was made of the essence of the contract. By clause 12 it was agreed that if the plaintiff made default in paying any of the instalments the defendants could rescind the contract and that thereupon all moneys already paid by the purchaser should be absolutely forfeited to the defendants. It was also a term of the contract that on the payment of certain moneys the defendants would convey to the plaintiff two named blocks of land. In May, 1930, the defendants conveyed to the plaintiff the two blocks of land, the value of which was taken to be 99,300*l.* The plaintiff had then paid to the defendants sums amounting to 139,500*l.*, leaving a difference of 40,200*l.* Subsequently the plaintiff failed to pay an instalment of 37,500*l.* falling due on May 2, 1931, and by letter dated May 4, 1931, the defendants gave him notice, pursuant to clause 12, that they rescinded the contract.

By letters dated March 15, 1933, and September 9, 1936, the plaintiff demanded payment of the 40,200*l.* This demand the defendants refused to comply with. The plaintiff then brought this action:—

Held, that the retention by the defendants of the 40,200*l.* was not in the nature of a penalty, and that in view of the terms of clause 12 it was not unconscionable on the part of the defendants to retain the 40,200*l.*

Action dismissed.

Steedman v. *Drinkle* [1916] 1 A. C. 275 considered.

ACTION.

By an agreement in writing, dated November 2, 1927, and made between the defendant company and the plaintiff, after reciting that the plaintiff had paid to the company the sum of 4000*l.* on account of the sum of 321,000*l.* thereinafter mentioned, it was agreed by clause 1 that the company would sell and the plaintiff would purchase for the sum of 321,000*l.* the lands belonging to the company in Tasmania and the

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stores, live stock, farm plant and other equipment therein mentioned. Clause 2 provided that the balance of 317,000*l.* should be payable as follows:—" (*a*) The sum of 15,000*l.* "without interest on or before the expiration of six calendar "months after the date of the resolution of the shareholders "of the Land Company approving this contract. . . . . (*b*) The "sum of 100,000*l.* . . . together with interest thereon from "the date fixed for payment of the said sum of 15,000*l.* at "the rate of 4 per cent. per annum on or before the expiration "of two years after the date fixed for the payment of the said "sum of 15,000*l.* . . . . (*c*) The sum of 50,000*l.* without "interest on or before the second anniversary of the date "fixed for the payment of the said sum of 15,000*l.* (*d*) The "sum of 100,000*l.* in two equal annual instalments of 50,000*l.* "each without interest on the two successive anniversaries "of the date of payment of the said sum of 100,000*l.* mentioned "in sub-clause (*b*) hereof. (*e*) The sum of 52,000*l.* without "interest on the anniversary of the date of the payment of "the said sum of 100,000*l.*" Clause 6 provided that " Upon "receipt of the sums of 100,000*l.* and interest mentioned in "sub-clause (*b*) of clause 2 hereof the Land Company will "convey to the purchaser or his nominees at the cost and "expense of the purchaser the unsold portion of the Surrey "Hills Block estimated to contain 122,839 acres or thereabouts "including roads And upon the receipt by the Land Company "of a further sum of 12,500*l.* to be paid upon the same day "as the said sums of 100,000*l.* and interest (and which sum "of 12,000*l.* is to be credited as part payment of the first "instalment of 50,000*l.* payable under the provisions of "sub-clause (*d*) of clause 2 hereof) the Land Company will "convey to the purchaser or his nominees at the cost and "expense of the purchaser the sections at or near South "Burnie set forth in the Schedule hereto and on the plan hereunto annexed coloured green And in each case the conveyance shall be delivered to the purchaser or his nominees "together with any relevant abstracts of title and thereupon the "purchaser or his nominees shall be entitled to full possession "and enjoyment of the lands conveyed and the Land Company "shall enter into the usual covenants for title further assurance "and otherwise." Clause 9 provided that "Upon payment "by the purchaser of the said sums of 100,000*l.* and interest "and 12,500*l.* and the execution of the conveyance and "delivery of possession referred to in the sixth clause hereof "the purchaser or his nominees shall be put into full possession "of the residue of the lands agreed to be sold and the rents "and profits thereof thereafter accruing and of the stores "livestock and other equipment. . . . ." Clause 10 provided that ". . . . A Schedule of the values for the purposes of "this agreement . . . . (including the lands mentioned in "the sixth clause hereof) has been prepared by the manager "of the Land Company and the total of such values is the sum "of 321,000*l.* less the agreed upon value of the stores live "stock and other equipment. . . . ." Clause 12 provided that "If the purchaser shall make default in the payment "of any of the other instalments mentioned in clause 2 hereof "or any part thereof on the due dates as provided in the said "clause the Land Company may (but subject to and without "affecting in any wise the sale and the conveyance or the right "thereto under clause 6 hereof) by notice in writing sent by "registered letter and addressed to the purchaser specifying "which of the remedies hereinafter mentioned the Land "Company intends to exercise, rescind this agreement and "may either enter into possession of any lands stores live "stock and other equipment remaining unsold whereupon "all moneys already paid by the purchaser shall be absolutely "forfeited to the Land Company and this contract shall "subject as aforesaid thereupon become absolutely null and "void or may subject as aforesaid resell the same at the "purchaser's risk either by public auction or private contract "(either together or in lots) subject to such stipulations as "it may think fit and in such case any deficiency in price "after giving credit for all sums paid by the purchaser or his "nominees as part payment of the sum of 321,000*l.* which may "result on such resale and all expenses attending such resale "or attempted resale shall be made good by the purchaser "and shall be recoverable as liquidated damages by the

"Land Company and any surplus arising from such resale "and realisation shall belong to the purchaser and for the "purposes of this clause time is of the essence of the contract." Clause 14 provided that the agreement was made subject to the approval of the shareholders of the defendant company, and it was provided that all moneys payable under the agreement, except certain moneys payable by the purchaser on sub-sales, should be payable in London.

Shortly after the execution of the agreement it was duly approved by the shareholders of the defendant company. The plaintiff paid to the defendant company in London upon the execution of the agreement the sum of 4000*l.* and on May 2, 1928, pursuant to clause 2 (*b*) a further sum of 15,000*l.* on account of the purchase price of the property. By cables passing between the defendant company and the plaintiff, dated April 25, April 28, and May 1, 1930, it was agreed that the provisions of the agreement should be varied so that upon due payment by the plaintiff of the sum of 100,000*l.* and interest falling due on May 2, 1930, and the sum of 12,500*l.*, part of the sum of 50,000*l.* also falling due on the same date, the defendant company would, in accordance with the provisions of clause 6 of the agreement, convey to the plaintiff the Surrey Hills Block and South Burnie Site, and would postpone for one year the date for payment of the sum of 37,500*l.* balance of the sum of 50,000*l.* upon terms that the 37,500*l.* should carry interest at the rate of 6 per cent. per annum, and that the defendant company should retain possession of the residue of the lands, stores, live stock and other equipment, instead of putting the plaintiff into possession thereof. In pursuance of the agreement as so varied, the plaintiff on May 2, 1930, paid to the defendant company in London the sums of 100,000*l.*, together with 8000*l.* interest, and 12,500*l.*, together making a sum of 120,500*l.* The defendant company in due course conveyed to the plaintiff the Surrey Hills Block and the South Burnie Site, but they retained possession of the residue of the lands and the stock. The purchase price of the Surrey Hills Block and the South Burnie Site as specified in the schedule to the contract was 99,300*l.*, and the total sums paid to the company amounted to 139,500*l.*, leaving a difference of 40,200*l.* In January 1931, the plaintiff found himself in financial difficulties and he was unable to pay the sum of 37,500*l.* falling due on May 2 under the agreement. By letter dated May 4, 1931, the company gave him notice, pursuant to clause 12 of the agreement, that it rescinded the agreement and elected to enter into possession of any lands, stores, live stock and other equipment remaining unsold, and it acted in accordance with that letter. By letter dated March 15, 1933, from the plaintiff's solicitors in Australia to the company, the plaintiff demanded payment of the sum of 40,200*l.* with interest thereon at 5 per cent. per annum until repayment, and by letter dated September 9, 1936, from the plaintiff's solicitors in London to the company the demand was repeated. The company by letters from its solicitors, dated April 21, 1933, and September 22, 1936, refused the plaintiff's demand and denied liability to pay the sum of 40,200*l.* or any part thereof. The plaintiff then commenced this action, in which he claimed :— " (1.) A declaration that the plaintiff is entitled "to repayment of such part of the moneys paid to the defendant "company by the plaintiff for or on account of the purchase "price of the lands and other assets comprised in the said "agreement as is not attributable to the purchase price of "the said Surrey Hills Block and South Burnie Site with "interest thereon from the 15th March, 1933. (2.) Payment "of the sum of 40,200*l.* (being the said part of the said monies) "as money had and received by the defendant company to "the use of the plaintiff with interest thereon from the date "aforesaid." In the alternative he claimed an account.

F. R. Evershed K.C. and *Gordon Brown* for the plaintiff. It is true there has been delay in bringing the action, but the company's position has not been altered in any way by the delay.

In the present case the vendor is claiming rescission. He must, therefore, restore to the purchaser any profits he has made under the contract. Where a vendor rescinds a contract he cannot enforce penalties by keeping moneys paid by the purchaser as instalments. In Williams on Vendor and Purchaser, 4th ed., pp. 1006–7–8, it is stated that any one on rescinding a contract on account of the other party's breach is bound to restore any profit other than the amount paid as deposit.

Fry L.J. draws a distinction between money paid as deposit and payment of an instalment in *Howe* v. *Smith* (1), and that case is referred to by Lord Dunedin in *Mayson* v. *Clouet.*(2) Here the vendor has said that the contract is null and void and must be put an end to. Then, in accordance with Williams on Vendor and Purchaser, he cannot retain any advantages.

Under the circumstances of this case the retention by the vendor of the money paid by the purchaser over the value of the properties acquired by him is in the nature of a penalty and cannot be retained by the vendor: *In re Dagenham (Thames) Dock Co.*; *Ex parte Hulse* (3); *Kilmer* v. *British Columbia Orchard Lands, Ld.* (4); and *Steedman* v. *Drinkle.* (5) The agreement in the *British Columbia Case* (4) bears a very close resemblance to the agreement here, and *Steedman* v. *Drinkle* (5) shows that relief would be granted on any terms that seemed just.

Cyril Radcliffe K.C., *Andrewes Uthwatt* and *Ian Macdonald* for the defendants. In *Blackburn* v. *Smith* (6) it was held that deposit money could not be recovered and Parke B. said (7) that money had and received could not be recovered. Under clause 12 of the contract the moneys paid by the plaintiff are clearly the property of the defendants. *Mayson* v. *Clouet* (2) is the only case that can be said to in any way support the plaintiff's claim, but even there the parties had not stipulated, as they have done here, that the vendors should retain the instalments. The matter here is concluded at law by the contract.

It is impossible here to find any basis of compensation: at what year is the value of the land to be taken, 1931 or 1936? They also cited *Barrow* v. *Isaacs & Son.* (8)

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(1) (1884) 27 Ch. D. 89; 99–100; 104–5.

(2) [1924] A. C. 980.

(3) (1873) L. R. 8 Ch. 1022.

(4) [1913] A. C. 319.

(5) [1916] 1 A. C. 275.

(6) (1848) 2 Ex. 783.

(7) Ibid. 783, 792.

(8) [1891] 1 Q. B. 417.

Evershed K.C. in reply. There can be a claim for money had and received where the contract has come to an end. Where time is made of the essence of the contract the purchaser cannot say after the day for payment has passed "I will "perform the contract." It is, therefore, beyond the point to say that the plaintiff here does not offer to fulfil the contract. Under clause 12 if the plaintiff owed 1*l.* on the last instalment the defendants could claim rescission and retain the moneys paid. That cannot be equitable.

He cited *Sloman* v. *Walter* (1) and *Sanders* v. *Pope*. (2)

FARWELL J. [After stating the facts:] In these circumstances this action has come on, and I have heard evidence from the plaintiff, who has given his reasons why he was not in a position to complete the contract in 1931. He has further given evidence with regard to his object in purchasing this property, and his endeavours to start business in the production of wood pulp from the trees on this territory. The defendants were armed with evidence as to the values of these properties at various times, evidence which was intended, I imagine, to show that it would be impossible now to give reasonable compensation, if it were otherwise a case for compensation.

It has been agreed between the parties that before going into that evidence it is desirable from the point of view of everybody to determine whether such evidence is necessary at all, because, if the plaintiff is not entitled to relief in this case in any event, then it is obvious that it would be a great waste of time to consider that somewhat voluminous evidence; and I am therefore now dealing with this case as a question of law upon the facts which I have stated: Aye or no, is the plaintiff entitled to relief?

The first question which I must consider is, What was the effect of the notice which was given by the defendant company to the plaintiff of the rescission of the contract? It has been argued on behalf of the plaintiff, that that letter, read in conjunction, as of course it must be, with clause 12 of the

(1) (1784) 1 Bro. C. C. 418.

(2) (1806) 12 Ves. 282.

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agreement, has the effect of making the contract null and void ab initio. In my judgment, that is not the true construction of the letter or of the contract. Clause 12 of the contract seems to me to be reasonably plain. It in effect provides that in the event of a failure to pay the instalments the defendant company shall have the option either of putting an end to any further obligations under the contract and retaining the money already paid, or of selling the land and looking to the plaintiff to make good any loss which may occur as the result of such sale. It is quite true that in clause 12 it is provided that subject as aforesaid the contract shall become null and void if the first of these two alternative courses is taken, namely, that of giving notice and retaining the money paid ; but in my judgment it clearly never was the intention of the parties that the contract should be null and void in the sense that it should be treated as though it had never existed at all.

No doubt the word " rescission," or the word " rescind," is capable of two meanings. The rescission of a contract may mean putting an end to it altogether, that is to say, making it null and void ab initio, or it may mean putting an end to it except so far as any obligation or right which arises under the contract if and when so determined.

In this case when the defendant company rescinded this contract they were not treating, nor were they intending to treat the contract as null and void ab initio, but what they were saying was this : " You, the plaintiff, have not performed "your part of the contract, because you have not paid this " instalment at the due date. We therefore, as provided by "the contract, give you notice that we are no longer bound "to carry out the terms of the contract and that we do not "propose to do so and we intend to retain, under the contract, "and as provided by it, the money which you have already "paid to us."

If that be the true view of the effect of the notice to determine this agreement, in my judgment no claim can be made to recover the money as money had and received. A claim for money had and received is based upon the assumption that the money in the hands of the defendants is and was at all times the money of the plaintiff which the defendants were holding for his use; but since the money which it is now sought to recover was rightly paid under the contract to the defendants it became the money of the defendants, and there can be no ground for a claim to recover it as money had and received. Whatever the rights of the parties may be with regard to the plaintiff's claim to relief he cannot maintain that claim as a claim to money had and received by the defendants for his use.

Indeed, I think that Mr. Evershed on behalf of the plaintiff appreciated that difficulty, because he has put his case upon a different ground and has applied for leave to amend accordingly. I have given him that leave, subject to any proper provision that I may think fit to make with regard to the costs of and occasioned by the amendment.

The case which the plaintiff now seeks to make is this: He says that the provision in this agreement for payment of the instalments was in the nature of a penalty, that is to say, it was not a sum which in the event of the contract not being completed by the plaintiff was to be treated as liquidated damages, but it was in the nature of a penalty for the failure by the plaintiff to perform the contract; and, being a penalty, a Court of Equity can relieve, and ought in this case to relieve, the plaintiff by ordering the defendants to repay to him some part if not the whole of the money which has been paid by him to the defendants as instalments under the agreement.

Several authorities have been referred to in support of that proposition and there is no doubt that there are cases in which a Court of Equity, as distinguished from a court of law, has relieved against penalties. The basis, and the whole basis, of such equitable relief—and indeed of all equitable relief—is that it is for some reason against conscience for the person who has the money in his hands to retain it and to refuse to repay the whole or some part of it. It was the application of that principle which originally enabled the Court of Equity to relieve a mortgagor against what was thought to be the harshness of the common law.

Similarly, a Court of Equity will in a proper case relieve against penalties, as for instance in *Sloman v. Walter.* (1) It should be noticed that that was strictly a case of a penalty, since the agreement to pay was wholly collateral and not part of the principal contract.

In the present case I have to consider this position: the parties on both sides, being sui juris and of sound mind, and in the case of the plaintiff an experienced business man, enter into this contract under which the plaintiff agrees to buy for a very large sum of money certain properties in Tasmania. The defendant company is willing to sell the properties upon certain terms. No doubt the defendant company would have been quite satisfied if the 321,000*l.* had been paid down there and then on the signing of the contract, but that was not the bargain that was made, it may be because that was not convenient to the plaintiff. But it matters not what the reason was; in fact the bargain was that the money was to be paid by certain instalments. As a term of the contract it was agreed that if the plaintiff should fail to pay any of the instalments at the due date, then the defendant company should have the right to put an end to the further performance of the contract, and should be entitled to retain the money paid.

On the face of it, it is a little difficult to see what ground there is upon which this Court can interfere. In order to entitle a plaintiff to relief from a penalty, it is necessary in my judgment for him to show that there is some ground upon which it would be unconscionable in the defendants to retain the money or the whole of the money. I find it difficult to see why, in a case of this kind, it should be unconscionable on the part of the vendor, who has contracted to part with his land on agreed terms, to enforce the contract if he so desires. There may be special circumstances in some cases, in which the Court would take the view that it was unconscionable, and that the plaintiff was accordingly entitled to relief, but unless I can be satisfied that in this case there is something unconscionable in what the defendants seek to do, in my judgment I have no jurisdiction to grant any relief whatsoever. It should be observed that this is not strictly a case of a penalty at all since the payment in question was an integral part of the principal contract.

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(1) 1 Bro. C. C. 418.

It is no ground for relieving a person from a contract which he himself has made to say that he has, through no fault of the defendants, found himself in difficulties, or that it may turn out to be not a good bargain from his point of view. Considerations of that sort are wholly irrelevant. The mere fact that the plaintiff finds himself in difficulties is in itself no ground for invoking the assistance of equity.

In the present case, consider what the position is: the plaintiff finds himself unable to carry out the contract. He must have known when he entered into the contract in the beginning that if he found himself for any reason in the unfortunate position that he was in in 1931, he was going to lose the money that he had already paid. He must have known that; both sides must have realised that, and intended that result. How can it be said that because that event has happened it is unconscionable for the defendants to retain the money? I know of no case in which such a claim has been successfully made, with the possible exception of one to which I must refer in a moment.

There are no doubt cases where there has been a failure to pay the instalments and to complete the contract, and the purchaser has then come forward and said: "I am here and "now ready and willing to complete the contract and to pay "the price originally stipulated by the contract and to carry "out its terms," and then the Court has said that it is inequitable and against conscience that the vendor should refuse specific performance and claim to retain the money already paid. That is because the Court has said that if the plaintiff is willing to carry out his contract, notwithstanding the fact that temporarily at any rate he was unable to do so, if he is willing and able to carry out his contract, it being the primary intention of the parties that the sale should take place, it would be against conscience for the defendant to say: "I will not give effect to the primary intention of the "parties, but I will refuse to complete, and I will retain the "money which has been paid to me."

The Courts have said in certain cases that that is not conscionable, and if it is a case where there can be specific performance, either with or without compensation, it is unconscionable that the purchaser should be required to pay over again the whole of the purchase price stipulated by the agreement originally, and accordingly the defendant is bound to treat the money which has already been paid or some part of it as part payment of the purchase price. No doubt the effect of that is, in a sense, that there is a new contract; but the Courts have said that justice can be done in that way, and that the equity between the parties in such a case is that the original contract shall be completed, or rather, a new contract on the terms of the old contract shall be completed, and that under the circumstances it is right that the vendor should give credit for the money which he has already received.

Whether such a course should be adopted in a case where the plaintiff has stood by for a long period, whether from his own fault or not, and has then come forward and claimed specific performance, is a different matter. It would depend very largely upon whether there has been any change of circumstances and whether it would be a hardship on the defendant to force him at that stage to complete, but all the cases (with the exception of one to which I am proposing to refer) in which the course stated above has been adopted, have been cases in which the Court has been able to decree specific performance.

With the exception of those cases and the one to which I am going to refer in a moment, I know of no case in which the Court has relieved against what has been called not quite accurately a penalty, in the case of a sale of land where there is an express stipulation in the contract that the money is to be retained by the vendor in the event of the purchaser failing to complete the contract; and I certainly do not intend to create a precedent for such a case, because, as I have already pointed out, I am wholly unable to see what equity there is in favour of a purchaser who has failed to complete his contract through no fault of the vendor.

The one case which appears to be an exception is *Steedman* v. *Drinkle.* (1) In that case it was a term of the contract that the money should be paid on certain dates, and time was made of the essence of the contract. The appellant in that case failed to carry out the terms of his contract, and the vendor sought to retain the money. Then the appellant commenced an action in Canada, seeking relief, and the action came before the learned trial judge, Newlands J., who held that, time being of the essence, he could not grant relief against the forfeiture of the purchaser's interest in the land, but he was prepared to allow an amendment of the statement of claim by adding a claim for relief against forfeiture of the amount paid. The respondents refused that offer and appealed. In the Supreme Court that decision was reversed and it was held that the Court had jurisdiction to grant specific performance, which they decreed accordingly upon payment of the amount remaining due to the appellant.

The matter then came before the Privy Council, and the Board took the view that, the parties having made time of the essence of the contract, specific performance could not be decreed, and the forfeiture of the money paid was a penalty from which relief could be granted on proper terms. What the terms should be, or under what circumstances there should be such relief, does not appear, because the Board gave the respondents liberty to apply to the Court of first instance, and said it was for the Court of first instance to determine what relief, if any, should be decreed.

That decision is one which in my judgment turns upon the particular circumstances existing there and is of no general application. The Board took the view that the appellant was ready and willing to perform the contract, and the respondents were resisting specific performance, and that, although the Court was unable to decree specific performance, because of the terms of the contract, since the respondents might have waived the term as to time being of the essence of the contract and agreed that the contract should be specifically performed, it was a case in which relief should be given to the appellant, the extent of such relief being a matter to be determined by the Court of first instance.

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(1) [1916] 1 A. C. 275.

In my judgment, the whole basis of that decision turns upon the fact that the appellant was ready and willing to perform the contract, and the only reason why performance was impossible was that the respondents refused to agree and the terms of the contract made it impossible for the Court to decree specific performance. The Court appears to have thought that it was unconscionable for the respondents to take up the attitude of saying: "We will not complete, "but we will retain the money," and on that ground relief could be granted.

If that be the true explanation, that case has no possible application here, because it is obviously quite impossible for the plaintiff to suggest that there can be any ground for asking for specific performance now, this action having been brought after so many years have elapsed and moreover he does not himself now seek such relief. The fact that the delay has been due to the plaintiff's misfortune matters not for this purpose. Apart from any of the special terms of the contract, the mere delay, which is due wholly to the plaintiff, renders it quite impossible for the Court to consider specific performance, even if the plaintiff asked for it. The plaintiff has chosen to stand by for all these years, and has not made the smallest attempt to complete the contract, and under those circumstances I am wholly unable to see any ground upon which the plaintiff can say that it is unconscionable for the defendants to retain possession of this money which he agreed by contract that they should have, in the events which have happened.

But assuming for a moment that this was a case in which there could otherwise have been any ground for relief, there is another reason, in my judgment, which makes any question of the sort absolutely impossible. One of the terms of the contract was that when a certain sum of money had been paid a portion of the property would be conveyed to the

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plaintiff or his nominees. The money was paid, and the property was conveyed to the nominees of the plaintiff, and the contract to that extent has been performed; and in my judgment it is impossible, having regard to those circumstances, for the plaintiff now to obtain relief of any kind.

I fail wholly to appreciate how it can even be suggested in this case that there is any ground for relief. The plaintiff has got a part at any rate of what he bargained for, and he has not got the remainder because he could not complete the contract. In my judgment the defendants are doing nothing which is against conscience, or which they are not entitled both in law and in equity to do. In all the circumstances the plaintiff should have no relief, and the defendants are entitled to retain the money which they have received from the plaintiff under the express terms of the contract.

In these circumstances, in my judgment, this action fails, and must be dismissed with costs.

Solicitors for plaintiff: *Linklaters & Paines.*

Solicitors for defendants: *Bischoff, Coxe, Bischoff & Thompson.*

P. J. B.

C. A.
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Oct. 14, 15.

WILTSHIRE BACON COMPANY *v.* ASSOCIATED CINEMA PROPERTIES, LIMITED.

[1936. W. 2893.]

Costs—Ancient lights—Action for injunction to restrain erection of building and for damages—Motion for injunction—Motion ordered to stand over till trial of action and costs reserved—Cross undertakings by plaintiffs and defendants—Sum paid into Court by defendants with denial of right to injunction—Plaintiffs' acceptance of sum and abandonment of claim to injunction—Order as to costs—Reserved costs of motion—Inquiry as to damages—R. S. C., Order XXII., *r.* 2, *sub-r.* 3.

The plaintiffs in an action claimed an injunction to restrain the defendants from continuing the erection of a building so as to be a nuisance or illegal obstruction to the ancient lights in the plaintiffs' premises. They also claimed damages. On October 7, 1936, a motion by the plaintiffs for an injunction in the terms of the writ came before Lewis J., sitting as Vacation judge. The motion stood over till the trial of the action, the defendants giving a limited undertaking as to building and the plaintiffs the usual cross-undertaking in damages; the costs of the motion were expressly reserved. On November 4 the defendants paid into Court the sum of 300*l.*, but denied that the plaintiffs were entitled to an injunction. On November 12 the plaintiffs accepted the 300*l.* and abandoned their claim to an injunction. On November 26, 1936, the case came before Farwell J. on the question of costs only and the plaintiffs' cross-undertaking in damages. His Lordship ordered that it should be referred to the Taxing Master to tax: (1.) the costs of the plaintiffs down to November 4, 1936, allowing such costs as would have been incurred if a statement of claim had been delivered; (2.) the costs of the defendants of the motion; these two sets of costs to be set off and the balance paid by the party from whom the balance should be certified to be due. He further ordered that an inquiry should be made whether the defendants had sustained any and if so what damages by reason of their undertaking in the order of October 7, which the plaintiffs ought to pay according to their undertaking, and that the costs of the inquiry should be reserved.

On appeal:—

Held, that the defendants by their payment into Court of the 300*l.* having admitted their liability, the plaintiffs were entitled to be paid their costs reserved by the order of October 7, and that the defendants were not entitled to an inquiry as to the damages sustained by them by reason of their having given the undertaking they did at the hearing of the motion.

Decision of Farwell J. [1937] Ch. 231 reversed.

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WILTSHIRE BACON CO. *v.* ASSOCIATED CINEMA PROPERTIES, LD.

APPEAL from a decision of Farwell J. (1)

This was an action in which the plaintiffs claimed an injunction to restrain the defendants from erecting or continuing the erection of a building so as to be a nuisance or illegal obstruction to the ancient lights of the plaintiffs' premises. They also claimed damages.

On October 7, 1936, a motion by the plaintiffs for an injunction in the terms of the writ came before Lewis J. The motion stood over till the trial of the action and the following order was made: the plaintiffs by their counsel undertaking (*a*) to abide by any order the Court might make as to damages, in case the Court should be of opinion that the defendants had sustained any by reason of their undertaking thereinafter contained, which the plaintiffs ought to pay, and (*b*) to set the action down for trial forthwith, and the defendants by their counsel undertaking until judgment in the action or until further order not to put any additional workmen or otherwise increase the rate of construction of their proposed new premises, and on the plaintiffs and the defendants by their counsel consenting to the order, the Court ordered that the action should be tried on the issues raised in the affidavits filed on the motion. And it was ordered that the deponents to the affidavits should attend at the trial for examination and cross-examination. It was also ordered that the plaintiffs and the defendants should be at liberty to read the affidavits at the trial and to call such further evidence as they might be advised. It was further ordered that the plaintiffs and the defendants should exchange lists of documents relating to the matters in question in the action within seven days from the date of the order and that all correspondence between the parties and their representatives should be treated as in evidence. And the plaintiffs and the defendants were to be at liberty to apply for a speedy trial of the action and the order was to be without prejudice generally. The costs of the motion were reserved to be dealt with at the trial.

On November 4, 1936, the defendants paid into Court the sum of 300*l*. and served on the plaintiffs notice of payment into Court as follows: "Take notice that the defendants "have paid into Court 300*l.* and say that that sum is enough "to satisfy the plaintiffs' claim for damages (the liability for "which is admitted) but that the defendants deny the plaintiffs' "right to any injunction." On November 12 the plaintiffs accepted the 300*l.*, and abandoned their claim for an injunction.

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(1) [1937] Ch. 231.

On November 26, 1936, the matter came before Farwell J. on the question of costs only and the plaintiffs' cross-undertaking in damages. His Lordship made an order in the following terms: "that it be referred to the Taxing Master to tax:—

"(1.) the costs of the plaintiffs of this action down to "November 4, 1936 (the date of payment into Court);

"(2.) the costs of the defendants of the motion reserved by "the said order dated October 7, 1936.

"And in taxing the said costs of the plaintiffs the Taxing "Master is to allow such costs as would have been incurred if "a statement of claim had been delivered by the plaintiffs.

"And the Taxing Master is to set off the said costs of the "plaintiffs and the costs of the defendants; and is to certify "to which of them the balance after such set-off is due.

"And it is ordered that the said balance be paid by the "party from whom the said balance shall be certified to be due "to the other party.

"And it is ordered that the following inquiry be made, that "is to say:—

"1. An inquiry whether the defendants have sustained any "and if so what damages by reason of their undertaking in the "said order dated October 7, 1936, which the plaintiffs ought "to pay according to their undertaking in the said order "mentioned.

"The costs of the said inquiry are reserved.

"All parties are to be at liberty to apply."

The plaintiffs appealed. The appeal was heard on October 14 and 15, 1937.

Charles Harman K.C. and *Andrew Clark* for the appellants.

Sir Herbert Cunliffe K.C. and *J. V. Nesbitt* for the respondents.

The arguments fully appear from the judgments.

SIR WILFRID GREENE M.R. This is an appeal by the plaintiffs in the action from an order of Farwell J. dated November 26, 1936. The action was an action whereby the plaintiffs, who are the owners of certain freehold premises in Swindon, sought to restrain the defendants, who were proposing to erect a cinema on a site opposite, from interfering with their right to light. The matter began in March of 1936, and a good deal of correspondence took place, into which I do not propose to go; but I shall have a word to say about it at the conclusion of this judgment, when I come to deal with an argument which has been based upon it. At the present moment it is sufficient to say that negotiations without prejudice went on for many months, but in the end they were abortive. By the end of July, I think it was, the defendants started to put up their steel framework, and on September 9 the plaintiffs asked for an undertaking which was refused, and on September 18 they issued a writ asking for the usual relief in cases of this kind. With the writ they served a notice of motion for an interlocutory injunction. The matter came before the Vacation judge, and when the motion was finally disposed of on October 7 he made an order to which it is necessary to refer.

The order contained an undertaking in damages by the plaintiffs inserted by reason of the fact that the order also contained an undertaking by the defendants as to what they would do pending the trial. That undertaking was as follows: "The defendants by their counsel undertaking until judgment "in this action or until further order not to put on any "additional workmen or otherwise increase the rate of "construction of their proposed new premises No. 37 Regent "Street, Swindon, in the county of Wiltshire." The order was a consent order, and the costs of the motion were reserved. The reason why that undertaking was given was this. The plaintiffs were asserting, while the defendants were denying, that unusual haste was being used in the erection of the building, and the undertaking was put in in order to ensure that no attempt should be made by the defendants to hurry on the building so as to confront the Court at the trial with a state of affairs which it would be difficult to undo. It is to be observed that at that time, and indeed down to November 4, the defendants were denying any infringement or intended infringement of the plaintiffs' rights. That attitude was maintained down to November 4, when they paid a sum of 300*l.* into Court. The notice of payment into Court which was served was to the following effect: "Take notice that "the defendants have paid into Court 300*l.* and say that that "sum is enough to satisfy the plaintiffs' claim for damages "(the liability for which is admitted) but that the defendants "deny the plaintiffs' right to any injunction." The wording of that suggests some little confusion between a right of action, of which there is only one, and the remedies, of which there were possibly two. But in substance it comes to this, that the notice admits that what the defendants were doing, or were proposing to do, amounted to an infringement of the plaintiffs' rights, and all that it says with regard to an injunction is that if the matter goes to trial, and the money is not taken out of Court, they at the trial will say that the case is one not for an injunction, but for damages.

That sum was accepted by notice dated November 12, and the notice is as follows: "Take notice that the plaintiffs "accept the sum of 300*l.* paid by the defendants into Court "in satisfaction of the claim in respect of which it was paid in "and abandon their other claims in this action except that they "will contend that they are entitled to be paid their costs "of the motion herein which were reserved by order dated "October 7, 1936." Subject to the question of costs, that acceptance was an acceptance of the sum paid in in full satisfaction of their cause of action, and after it was paid out it was of course impossible for the plaintiffs to proceed with the action and claim an injunction in addition to the money they had taken out of Court. The action having been set down and not having been finally disposed of by these means, it came on for hearing on November 26 before Farwell J. There were two questions which were argued

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before the learned judge, and in respect of which he delivered judgment. (1) The order which he made was to this effect, that the plaintiffs got the costs of the action down to the date when the money was paid into Court, the defendants were given the costs of the motion, which had been reserved, and an inquiry was ordered as to the damages, if any, sustained by the defendants by reason of the undertaking which was embodied in the interlocutory order to the effect that they would not increase the rate of construction of the premises.

From that judgment the plaintiffs appeal, and they say that the learned judge was wrong in giving to the defendants the costs of the motion and was wrong in ordering that inquiry as to damages. It is to be noticed from the judgment of the learned judge that he decides the matter, I think quite clearly, not with reference to any special facts of the case, but on what he conceives to be the principles applicable to those facts. On the question of costs he says (2): "If a plaintiff in an action "of this kind moves for an interlocutory injunction, he does so "at his own risk as to costs, and, if on the motion he obtains "an injunction and the costs are reserved, he may be liable "to pay the costs of the motion if at the trial he fails to "establish his right to an injunction and gets relief by way of "damages only." In connection with those observations it is, I think, important to remember that there is only one cause of action. But there are alternative remedies, and the plaintiff, who complains of an infringement of his right to light, and establishes the validity of that complaint, is prima facie entitled to an injunction.

In the old days that would have been the only relief that he could have got from a Court of equity; now, if he establishes his right to an injunction, the Court is entitled, as a matter of discretion, if on consideration of all the circumstances it so thinks proper, to substitute for that remedy a remedy in damages only. I myself should have thought, in a case where at the trial the plaintiff has established his cause of action—i.e., has established his prima facie right to an injunction, but the judge decides that the case is one in which he will award

(1) [1937] Ch. 233. (2) Ibid. 234.

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damages only, but not an injunction—that as a general rule if the plaintiff had obtained an injunction on motion, and the costs had been reserved, he would get those costs at the trial, for the reason that he had been put into the position of being forced to bring the action, and that he had established his prima facie right to an injunction, losing it only because the judge decided that, on the facts, damages would be the proper remedy. I must not be taken by that to be laying down any hard and fast rule, because quite clearly in many cases the facts may be such as to justify the giving of those reserved costs to the defendants, or at any rate depriving the plaintiff of them. I am only examining the matter on principle, as the learned judge does, and in my opinion the normal order to make in such a case would be to give the plaintiff his costs of the interlocutory motion.

The learned judge goes on as follows (1): "That is not the "position here because the action never came to trial; but "the plaintiffs by taking the money out of Court in satisfaction "of the whole claim must be taken to have abandoned their "claim to an injunction with the same result as far as the "costs are concerned as if they had sought an injunction and "failed to obtain it." With great deference to the learned judge, I am not sure that his observations really give effect to the distinction between an interim injunction and a final injunction. It does not appear to me to follow by any means that, because at the trial the Court in its discretion declines to grant an injunction and gives damages, an injunction granted on motion was necessarily granted in such circumstances as to justify the Court in saying that the plaintiff was not warranted in asking for it, and therefore should bear the costs of the motion. It seems to me, as I have already said, that that result would not in the normal case follow at all, and I cannot, with respect, accept the view of the learned judge. Looking at the matter purely on principle, the position appears to me to be this. The defendants at the time of the motion contested the plaintiffs' right to any relief at all, but at a subsequent date they admitted that their acts were infringing

(1) [1937] Ch. 234.

or would infringe the plaintiffs' rights. If the plaintiffs had not elected to take the money out of Court, but had continued with their action to trial, they might or might not have obtained an injunction ; I know not; but suppose that they had obtained damages, and not an injunction ; the effect of the payment into Court, if not accepted, would of course have an effect on costs, but the mere fact that the plaintiffs did not obtain an injunction at the trial does not seem to me to have any necessary bearing on the propriety of the launching of the motion. In the absence of some circumstances which makes the launching of such a motion in other ways improper, my view is that the plaintiffs in such a case as this would be entitled to the reserved costs. In my opinion the judgment of the learned judge on that matter cannot stand.

The other matter is that relating to the inquiry as to damages. The learned judge says with regard to that (1): " The plaintiffs have never established their right to the "injunction which they sought and they are consequently "liable to the defendants for any damages which "they may have suffered as the result of the undertaking "which the defendants gave." With great deference to the learned judge, I cannot accept that view. When the motion came before the Vacation judge, the defendants were, of course, in the usual position that they could either resist the claim for an interim injunction, or they could come to some accommodation by offering an undertaking which might be accepted. The case that they were making at that time, quite apart from their allegation on the merits that there was no infringement of the plaintiffs' right at all, was of this nature. They said: " The conduct of the plaintiffs during "the history of this matter has been such that it would be "unjust to grant an injunction which would interfere with "the defendants' building." That was the case that they were making and putting up before the Vacation judge. Instead of pursuing the argument to its bitter end, the not unnatural course was taken of coming to an arrangement and giving an undertaking; but be it observed that that position

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followed inevitably from the circumstance that at that date the defendants were disputing the right of the plaintiffs to any relief at all. That attitude they afterwards abandoned by admitting liability—i.e., admitting that they were infringing.

In those circumstances, can it be said that by a payment into Court of that kind the plaintiffs are put into this dilemma, that either they must refuse to take the money out of Court and risk the consequences, and go on to trial in order to establish the fact that they were right in pressing for and obtaining that undertaking, or they must take the money out of Court and, according to the learned judge's judgment, automatically and inevitably submit to an inquiry as to the damages caused by the undertaking which the defendant has given ? It appears to me that no such dilemma really arises, and the learned judge has applied a principle which in my opinion does not really exist at all. The position is this, that the plaintiffs by the admission of the defendants have established their cause of action ; that is incontestable. The fact that they have not pressed for an injunction, or even the fact, if it be the fact, that if they had done so they would not have obtained it from the Court, does not necessarily imply in the very least that the undertaking was one which ought never to have been asked for or accepted, and in the circumstances was wrong. Here, again, there may be cases where the facts would show that the undertaking in the circumstances ought not to have been asked for, and that the inquiry as to damages ought to be granted ; but apart from some special facts, it appears to me, if I may say so, with all respect to the learned judge, that in a case of this kind the plaintiff is not to be put to an inquiry as to damages in respect of that kind of undertaking.

I have dealt with the matter so far without any reference to the argument which Sir Herbert Cunliffe put forward, and which indeed, as I understood it, was the only argument. Sir Herbert Cunliffe did not really attempt to support the principles on which the learned judge appears to have decided the case. The way he put his case was this. He said that this is an exercise of discretion by the learned judge with all the facts before him. As I have said, I am unable to accept the view that this was a case of discretion at all; but in spite of that, Sir Herbert, of course, is entitled to ask this Court to uphold the judgment on the grounds which he has brought forward, although they are different grounds from those on which the learned judge acted. He has read to us a great deal of correspondence, about which I make no complaint, which he says establishes the proposition that the plaintiffs down to the time when the action was launched were claiming, and were claiming only, a money payment, and were not claiming an injunction, and gave no indication that they wished for an injunction. He says that in those circumstances it would have been unfair and improper for the Court on the hearing of the motion to grant an interlocutory injunction, because no injunction ought to be granted in a case where the plaintiffs indicate that damages are a sufficient remedy. I have carefully followed the correspondence which has been read. A substantial part of it is without prejudice. I am not quite clear how it came about that those letters were before the Court, but no objection seems to have been made on either side, and I must treat those letters as being before the Court. I am quite unable to construe that correspondence, taken as a whole, and conducted as it was down to a certain point in a spirit of neighbourliness and a desire to help, as containing expressly or by implication any abandonment by the plaintiffs of any claim for an injunction which they might have, or any indication that relief of that kind might not be asked for in the event of negotiations breaking down. In fact in a letter towards the conclusion of the correspondence it is made clear that the expert adviser of the defendants never interpreted the correspondence as involving any such attitude on the part of the plaintiffs. Having regard to the fact that the correspondence does not appear to me to be such as to prevent the plaintiffs asking for an injunction in the action, it seems to me that for the purposes of the present argument it really does not carry the defendants any way at all.

The result is that the judgment of the learned judge on both points must be reversed, the plaintiffs should have the reserved costs of the motion, and there will be no inquiry as to damages such as was ordered by the learned judge. That conclusion I come to first of all on principle, disagreeing respectfully with the learned judge's view as to the principles applicable, and secondly on a consideration of the special facts which were urged by Sir Herbert Cunliffe.

ROMER L.J. When the defendants on November 4, 1936, paid 300*l.* into Court they necessarily admitted, and now admit of course, that the building they were erecting or proposing to erect would be an infringement of the plaintiffs' legal rights. That being so, when the plaintiffs issued their writ on September 18, 1936, they were prima facie entitled to an injunction to restrain the infringement by the defendants of their legal rights. As in the course of this argument, and indeed as I gather in the course of the argument before Farwell J., some doubt seems to have been cast on the rights of a plaintiff whose legal rights have been infringed, I would like to refer to what was said by Lord Kingsdown in *Imperial Gas Light & Coke Co.* v. *Broadbent* (1) in a passage which was cited by Lord Halsbury in *Shelfer* v. *City of London Electric Lighting Co.* (2): "'The rule I take to be "'clearly this: if a plaintiff applies for an injunction to "'restrain a violation of a common law right, if either the "'existence of the right or the fact of its violation be disputed, "'he must establish that right at law' (and, I presume, "its violation); 'but when he has established his right at "'law, I apprehend that unless there be something special "'in the case, he is entitled as of course to an injunction to "'prevent the recurrence of that violation.'" A. L. Smith L.J., dealing with the same aspect of the matter in the *Shelfer* case (3), said: "Many judges have stated, and I emphatically "agree with them, that a person by committing a wrongful "act (whether it be a public company for public purposes or "a private individual) is not thereby entitled to ask the

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(1) (1859) 7 H. L. C. 600, 612.
(2) [1895] 1 Ch. 287, 310.
(3) [1895] 1 Ch. 322.

"Court to sanction his doing so by purchasing his neighbour's "rights, by assessing damages in that behalf, leaving his "neighbour with the nuisance, or his lights dimmed, as the "case may be. In such cases the well-known rule is not to "accede to the application, but to grant the injunction "sought, for the plaintiff's legal right has been invaded, and "he is prima facie entitled to an injunction." Then, as is well known, the learned Lord Justice proceeded to indicate the special, and one may say the very special, circumstances which must exist before the Court in the exercise of its discretion will award damages in lieu of granting an injunction. When, therefore, the plaintiffs in this case issued their writ on September 18 they were prima facie entitled to an injunction. Further than that, they were entitled, according to the rules of procedure in these Courts, to apply at once to the Court for an interim injunction for the purposes of keeping matters in statu quo pending the decision by the Court as to the existence or non-existence of any cause of action. They moved the Court, as we know, before Lewis J., and on that occasion no injunction was granted, nor was an undertaking not to build at all in the meantime given; but a modified undertaking was given as to the extent to which the defendants should be entitled to build pending the trial of the action.

In my opinion, for the purposes of the decision of this case, it matters not that it was an undertaking which was given instead of an injunction granted by the Court. Nor does it matter at all for the purposes of the decision of this case that the undertaking was an undertaking not to build beyond a certain rate rather than an undertaking not to build at all. I propose therefore to deal with this case on the footing that on October 7 the Court granted an injunction to restrain the defendants from proceeding with their building pending the trial of the action, taking from the plaintiffs, of course, the usual undertaking in damages. I will further assume—because I agree with Mr. Nesbitt that for the purposes of this case there is no difference between what has happened and what I am going to assume—that the case came on for trial, and that at the trial the Court came to the conclusion first that the plaintiffs' rights had been infringed, but, secondly, that having regard to the special circumstances of the case, the Court in the exercise of its discretion would not grant an injunction but would award damages.

Supposing that that had happened, and that the costs of the motion had been, as they were in this case, reserved, it by no means necessarily follows that because an injunction was not granted at the trial of the action the interim injunction granted on the hearing of the motion was improperly granted. The question to be determined on the motion was as to whether pending the decision of what at that time was a disputed question—whether the plaintiffs' legal rights had been or would be infringed by what the defendants were doing—the matter should be kept in statu quo. And it by no means follows that matters ought not at that time to be kept in statu quo pending the decision of that question of legal liability, because, when the legal liability has been established, the Court in the exercise of its discretion thinks that no injunction should be granted. In my opinion, if an interim injunction had been granted to restrain the defendants from continuing to build at all pending the trial of the action, followed by a trial at which the infringement of the plaintiffs' rights had been established, but the Court in the exercise of its discretion awarded damages instead of an injunction, the Court ought, unless there are special circumstances in the case, to award to the plaintiffs the costs of the motion which had been reserved, and ought not to grant any inquiry as to the damages sustained by the defendants by reason of the injunction which the plaintiffs ought to pay, because the Court ought to arrive at the conclusion that the injunction was properly granted.

It must be remembered, as was pointed out by the Master of the Rolls during the argument, that the amount of the damages which are awarded in such a case may depend, and may depend quite largely, on the fact that during the interval between the issue of the writ and the trial, which may be an interval of a year or more, the plaintiffs have suffered no damage by reason of the existence of the injunction, and their rights have not been affected in any way. One of the things to be taken into consideration by the judge in deciding whether a perpetual injunction should be granted at the trial or damages awarded in lieu of an injunction is the amount of damage sustained by the plaintiffs, and it may well be in certain cases that one of the reasons why a judge does not grant a perpetual injunction at the trial is that having regard to the interim injunction the damages sustained by the plaintiffs are comparatively trivial, whereas they might not be trivial if no such injunction had been granted. That illustrates what I have ventured to point out already, that it by no means follows that because a perpetual injunction is not granted at the trial, the interim injunction should not have been granted on the hearing of the motion. On the contrary, I think as a general rule that where at the hearing of the motion it appears that the plaintiffs' rights are being challenged by the defendants, unless the evidence is so conflicting that the Court thinks an early trial is the better remedy, an injunction should be granted to restrain the defendants from interfering with the status quo ante pending the decision of the legal rights, the position of the defendants, of course, always being amply secured, and the Court must see that they are amply secured, by the undertaking of the plaintiffs. I say that the Court must see they are amply secured, because the Court will always take into consideration the financial position of the plaintiffs before it grants an injunction. It always likes to be sure that the plaintiffs' undertaking in damages is one which will be effectual to indemnify the defendants if it turns out at the trial that the injunction was wrongly granted—that is to say, that the plaintiffs' rights at that time were not infringed or threatened.

In my opinion, as a matter of principle, and I think the learned judge decided this question as one of principle, the costs of the motion ought to have been the plaintiffs' costs, and there should have been no inquiry directed as to the damages sustained by reason of the defendants having given the undertaking which they gave on the hearing of the motion.

I have nothing to add to what the Master of the Rolls has said as to the special circumstances that existed in this case arising out of that correspondence without prejudice which took place between the parties before the issue of the writ.

I agree with the order which the Master of the Rolls has propounded.

MacKinnon L.J. I agree. If on October 7 the defendants had said: "We admit the plaintiffs' claim, we are "willing to pay damages, and we are willing to submit "to an order for an inquiry as to those damages," and if the plaintiffs had then insisted on going on for trial claiming an injunction, there might have been a great deal to be said for Sir Herbert Cunliffe's contention as to both these matters. The truth is that at the date of the writ, September 18, and on October 7, and all the time until November 4, the defendants were asserting, as is now admitted, wrongly, that they had not infringed the plaintiffs' rights at all. It was because of that wrongful assertion of the defendants that they had to give on October 7 the undertaking not to hurry on with the building. They are now asking that the plaintiffs should pay damages under their cross-undertaking. Those damages were caused, if at all, solely by the defendants' own wrongful contention and attitude. In these circumstances, it appears to me to be impossible to contend that the plaintiffs ought to pay any damages or to be deprived of their costs of the motion.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for Ryland, Martineau & Co., Birmingham.*

Solicitors for respondents: *H. S. Wright & Webb.*

W. I. C.

In re JOHNSON AND JOHNSON (GREAT BRITAIN), LIMITED'S LETTERS PATENT No. 387,125.

C. A.
1937
Oct. 12, 13, 14; Nov. 26.

Patent—Application for revocation under s. 26 *of the Patents and Designs Acts,* 1907 *to* 1932*—Unfair and insufficient description—Amendment—Insufficiency incapable of cure by amendment—Practice of Comptroller—Taking into account of want of utility, prior user or want of subject-matter—Not proper matters for consideration on opposition proceedings under s.* 11 *or proceedings under s.* 26*—Patents and Designs Act,* 1907 (7 *Edw.* 7, *c.* 29), *ss.* 11, 21, 25, 26 *—Patents and Designs Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 80), *s.* 4.

The practice of the Comptroller-General in opposition proceedings under s. 11 of the Patents and Designs Acts, 1907 to 1932, and proceedings for revocation under s. 26 of taking into consideration want of subject-matter should cease. The matter is only proper for consideration in proceedings for revocation under s. 25.

The power of the Comptroller under s. 26 to require amendment of a specification by " disclaimer, correction, or explanation " is subject to the limitation imposed by s. 21, sub-s. 6, that " No "amendment shall be allowed that would make the specification, "as amended, claim an invention substantially larger than or "substantially different from the invention claimed by the "specification as it stood before the amendment."

In re Eveno's Patent (1932) 49 R. P. C. 385 followed.

A company applied to the Comptroller, under s. 26, for revocation of a patent granted to patentees for " Improvements in or relating "to waterproof fabrics and the production thereof " on the ground (amongst others) that the nature of the invention or the manner in which it was to be performed had not been fairly or sufficiently described. The patentees sought, if necessary, to amend the specification in two particulars. The Comptroller made an order revoking the patent and Luxmoore J. dismissed an appeal from this decision :—

Held, by the Court of Appeal, that the specification was bad from insufficiency as there were two mutually contradictory indications as to the nature of the waterproofing material which would not be remedied by the suggested amendment.

APPEAL from Luxmoore J.

On February 3, 1932, Letters Patent No. 387,125 were granted to Johnson & Johnson (Great Britain), Ld. in respect of " Improvements in or relating to waterproof fabrics and "the production thereof."

The complete specification began : " The invention relates "to waterproof fabrics and to the production thereof and "more particularly to fabrics whether interstitial or otherwise, "such as woven or other textile fabric and fabrics of the "nature of paper, which inherently or of themselves are not "waterproof and require treatment to make them so, and "it provides a waterproof fabric possessed of certain definite, "distinctive and novel characteristics whereby it is susceptible "of manifold uses and applications in the industrial arts and "sciences.

"The waterproof properties of liquid coating compositions "such as reaction condensation products having resin characteristics are well known and prior to this invention it has "been proposed to make fabrics waterproof by treating them "with reactive resinous materials. The liquid coating composition was applied generally by dipping or by spraying "and the result was more or less satisfactory when relatively "heavy gauge or non-uniformity of thickness of the coating "was of no moment and where stiffness or tackiness, either "manifest or eventual, were not problems."

The specification went on to say that attempts to perfect the practice by resort to " calendering " failed because none of the known materials lent themselves to calendering and continued :—

"The nature of the invention resides in the method, and "in the product of the method, which in one aspect consists "in the selection and treatment of a reactive resin composition "to condition it for successful application by calendering or "otherwise, and in another aspect consists of the method "of calendering, or in short co-ordinating the factors of "proper coating material and proper application of that "material, for the ultimate purpose and result of producing "a waterproof fabric, characterized by its marked flexibility, "uniformity of gauge or thickness, and by its stability and "freedom from tackiness over long periods of time regardless "of exposure to different temperature conditions."

The specification went on to describe the various ways in which a suitable coating material could be obtained, and after describing the way to prepare one such material in particular from which it was stated that excellent results had been obtained, the passage concluded: "The product "when run through a filter press is a soft semi-rubbery mass "having an odour strongly suggestive of ammonia." The specification went on to discuss the nature of the reactive product produced, and said "the material is so peculiar in "its properties and behaviour that it is desirable, if not "essential, to subject it to mechanical treatment, as by "milling or kneading, calculated to work it down, and best "results are achieved by subjecting it to successive millings "under different temperature conditions." The specification then gave an example of the best mode of milling so as to produce "a mass of the unformed amorphous material" which "is then friction-calendered on to a base such as cloth." The specification then discussed the temperature conditions advisable for the three rolls used in calendering and continued: "The material to be calendered passes under the lower "calender roll and between that roll and the middle roll and "thence to further treatment and/or storage. The resinoid "material in a non-fugitive or semi-rubbery state is applied "to the surface of the top calender roll or to the bight of that "roll and the middle roll. The coated fabric when it leaves "the calender is not very tacky and may be rolled upon "itself or stored in the usual way on a regular mill roll. In "the above example in this state it is not stable for the various "commercial purposes for which it is intended. Hence in "order to promote further polymerisation, to remove any "vestige of tackiness, and to ensure a hard enamel surface "finish characterised by its uniformity of gauge, its smooth-"ness, its resistance to abrasion and its flexibility which for "all practical purposes is that of the foundation fabric, the "coated material is subjected to heat treatment . . . . It "may here be remarked that for some resinoid mixtures and "for certain uses, heating beyond the calender stage is not "necessary.

"It is characteristic of the new product thus obtained that "the cohesion or binding action between the foundation fabric "and the coating is of such nature that there is controlled "penetration into the interstices or void of the foundation "fabric and without penetration into the fibres of the fabric "itself. We have discovered that penetration between the "interlocking fabric fibres results in a sharp drop in flexibility "of the fabric itself. This controlled or non-penetration is a "valuable attribute . . . ."

The material claims were as follows :—

"1. As a new article of manufacture, a flexible fabric having "a friction calendered phenolic resinoid coating, the resinoid "material, when applied, existing as a substantially non-"fugitive or semi-rubbery mass whereby it is substantially "confined to the surface of the fabric.

"2. A flexible waterproof fabric consisting of a porous "sheeted structure whereof one side has a friction calen-"dered coating of phenolic resinoid material applied as "a semi-rubbery mass whereby it is restrained from "filling the interstices or void of the fabric, and whereof "the other side has another coating not confined to the "surface.

"3. The method of producing a flexible phenolic resinoid "coated fabric, which consists in filming a foundation fabric "with phenolic resinoid material by a friction calendering "operation characterized by the fact that the phenolic "resinoid material is applied in a substantially non-fugitive "or semi-rubbery state whereby it is confined to the surface "of the fabric and substantially withheld from penetrating the "interstices and voids thereof.

"4. The method of producing a friction calendered phenolic "resinoid coated fabric as claimed in claim 3 in which to "condition the material for friction calendering the semi-"rubbery mass is first treated by working down or milling "in the presence of heat and of an agent calculated to combine "chemically with the excess oils or uncombined phenol in "the resin."

On April 20, 1934, the Minnesota Mining & Manufacturing Company applied under s. 26 of the Patents and Designs Acts, 1907 to 1932, for revocation of the patent on the grounds (1.) that there had been prior publication of the invention, and (2.) that the nature of the invention or the manner in which it was to be performed was not fully and fairly described and ascertained in the complete specification.

A large number of declarations were put in evidence and calendering was there explained. Three rolls were used and the waterproofing material passed between the top and middle rolls which generally ran at different speeds so as to cause friction and to roll out the material into a thin sheet. This and the fabric to which it was to be applied then passed between the middle and lower rolls for the purpose of causing the sheet to adhere to the fabric. The effect of any other material evidence is stated in the judgment of the Court. There was a difference of opinion whether friction calendering involved friction between both sets of rolls or only between the upper pair.

The Assistant-Comptroller held that both in regard to the coating material and the calendering operation the patentees' specification failed to satisfy the two conditions imposed by s. 2, sub-s. 2, of the Patents and Designs Acts, 1907 to 1932—namely, that a complete specification must particularly describe and ascertain (1.) the nature of the invention and (2.) the manner in which the same was to be performed. He also refused to allow the patentees to amend the specification in the various details asked for. He therefore allowed the application for revocation.

On an appeal by the patentees Luxmoore J. said that s. 26 of the consolidated Acts conferred on any person who would have been entitled to oppose the grant of a patent the right within twelve months from the date of the entry of the patent to apply for an order revoking the patent on any one or more of the grounds on which a grant of the patent might have been opposed. The grounds of opposition were therefore limited to those set out in s. 11. In proceedings under s. 26 the Comptroller might make an order revoking the patent or requiring the specification relating thereto to be amended by disclaimer, correction or explanation, or dismiss the application. The power to amend in proceedings under s. 26 was not so wide as in opposition proceedings as he had already decided in *In re Eveno's Patent.* (1) It was the same as that conferred by s. 21 and was limited therefore to amendment by way of disclaimer, correction or explanation; but it was subject to the further limitation contained in s. 21, sub-s. 6, that no amendment should be allowed that would make the specification as amended claim an invention substantially larger than or substantially different from the invention claimed by the specification as it originally stood. The Assistant-Comptroller had revoked the patent and refused to allow the amendments asked for as not being permissible under s. 21. The patentees appealed and asked that certain amendments might be allowed. [His Lordship proceeded to discuss the specification and the amendments asked.] On careful consideration of the specification, in the light of the evidence available, he had come to the conclusion that he must refuse the amendments asked for as they would be converting the patent into one for an invention substantially different from that claimed. In these circumstances he agreed with the Assistant Comptroller that the specification in its unamended form, both in regard to the coating material and the calendering operation, failed to satisfy the conditions imposed by s. 2, sub-s. 2. The specification did not sufficiently describe the manner in which the invention was to be performed nor describe sufficiently the nature of the invention. The patent must be revoked.

The patentees appealed. The appeal was heard on October 12, 13 and 14 and judgment given on November 26, 1937.

Hon. Sir Stafford Cripps K.C. and *L. F. Heald K.C.* for the appellants. The grounds on which the Comptroller may refuse to grant a patent are defined in s. 11, sub-s. 1, and they apply to the present case by virtue of s. 26. The material ground here is that stated in s. 11, sub-s. 1 (*c*), and it is "that "the nature of the invention or the manner in which it is "to be performed is not sufficiently or fairly described and

(1) 49 R. P. C. 385.

"ascertained in the complete specification." That has received interpretation in *In re Schwarzkopf's Application* (1) and it shows that even though there are difficulties in the specification it is sufficient if a fair description of the invention can be found. The appellants contend that with the specification as it stands that is to be found. But if necessary they ask to be allowed to amend the specification (1.) by omitting from the expression " soft semi-rubbery mass " in the body of the specification the word " semi-rubbery," and (2.) by inserting in the specification the following definition : " The "expression ' friction calendering ' when used in this specifica-"tion means an operation employing rolls to form under a "friction rolling action from a plastic coating composition a "coherent sheet or film of substantially uniform thickness or "gauge, and to apply such sheet or film by a rolling action "without friction on to a foundation fabric." The power of the Comptroller on an application under s. 26 is to require "the specification . . . . to be amended by disclaimer, "correction or explanation." It was held by the Comptroller that this limits the power in the same manner as in the case of opposition to registration under s. 21. By s. 21, sub-s. 6, no amendment is to be allowed that would make the specification "claim an invention substantially larger than or sub-"stantially different from the invention claimed by the "specification as it stood before amendment." There is no such provision in s. 26, and the concluding words of s. 26, sub-s. 2, provide that " the Comptroller shall not make an "order revoking the patent unless the circumstances are "such as would have justified him in refusing to grant the "patent had the proceedings been proceedings in an opposition "to the grant of a patent." In opposition proceedings the limitation does not apply and the position must be the same under s. 26. *In re Eveno's Patent* (2) is relied upon by the respondents, but it is contended that the decision on this point was incorrect.

[Romer L.J. What happens on an application to register ?]

The Comptroller regards himself as having an inherent right

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(1) (1914) 31 R. P. C. 437, 439. (2) 49 R. P. C. 385.

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to have the specification put in the way that the statute requires. It is always assumed that there is a wider power under s. 11 than under s. 21. It is contended that there is power to grant the amendments asked for: see *In re British Thomson-Houston Co.'s Patent* (1); and that, if the specification is at present defective, these amendments will cure it. A principle to be applied in interpreting the specification is that the document must be used as its own dictionary: *Needham* v. *Johnson & Co.* (2) Applying that principle there is no difficulty in this specification.

Two matters here are said to render the patent one that ought to be revoked. The main question is as to the meaning of friction calendering as used in the specification. The opponents seek to give it a meaning which prevents the patent being valid—namely, that there must be friction not only between the top and middle rollers but also between the middle and bottom rollers. On a careful examination of the specification it is contended that this construction is negatived. Friction calendering may mean that there is friction between either pair of rollers, but when the specification is used as its own dictionary, a clear intention is shown that the middle and bottom rollers should run at the same speed so as not to rub the waterproofing deeply into the fabric. This view is supported by the evidence which shows that all with knowledge of the art realized what the operation must be to achieve the patentees' ends. But if this were not so, there can be no ground for refusing the insertion of a definition of friction calendering that would accord with the rest of the document and be only a disclaimer of the wider meaning.

The other question is as to the use of the expression "soft "semi-rubbery mass." It is said that an ambiguity is created owing to the phraseology applied to the mass at different stages. The ambiguity is denied, but once again if it existed the matter could be cured by a permissible amendment consisting of omitting the word "semi-rubbery." The amendment adds nothing to and does not enlarge the invention.

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(1) (1919) 36 R. P. C. 251, 254.

(2) (1884) 1 R. P. C. 49, 58.

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Two matters to be borne in mind are (1.) that under s. 26 the onus is on the applicant for revocation to make out his case; and (2.) that any question of want of subject-matter is not within the jurisdiction of the Comptroller under ss. 11 and 26. Such matters only arise on proceedings for revocation under s. 25. Here the Comptroller exceeded his jurisdiction by deciding the case partly on the ground of want of utility. In so doing he is following the practice that has sprung up, and *The King* v. *Comptroller-General of Patents. Ex parte Muntz* (1) is relied on as justifying it. In fact, however, it does not do so: see also *In re Compagnies Réunies des Glaces et Verres Speciaux du Nord de la France's Application.* (2) The difficulty that arose in the first of these cases was created by the definition of invention in s. 93 as including "an alleged "invention" but its meaning was there explained.

[They also referred to *In re Kodak, Ld.'s Application.* (3)]

R. Moritz K.C. and *G. S. W. Marlow* for the respondents. It is admitted that the practice of the Comptroller is wrong, but that has no reference to the present case for it was never argued that there was no subject-matter. If the Comptroller, as has been suggested, had decided this case partly on the ground of want of utility, the Comptroller would have exceeded his jurisdiction, but this question in fact never arose.

In the next place, the limitations of s. 21 must apply to the amendments permitted under s. 26. It would be very curious if this were not so, for a man who on seeking to amend his specification was confronted by s. 21, sub-s. 6, could escape it by inducing some one else to proceed under s. 26. As soon as a complete specification reaches the office it is referred to an examiner and if he reports that it is not prepared in the correct way registration may be refused till after amendment. If the examiner reports that the invention is not the same as that described in the provisional specification, the Comptroller can either require the complete specification to be amended or cancel the provisional specification. In no case is an enlargement or alteration of the invention permitted

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(1) (1922) 39 R. P. C. 335.

(2) (1930) 48 R. P. C. 185.

(3) (1936) 53 R. P. C. 276.

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by the Comptroller. No enlargement is permissible whether under ss. 11, 21 or 26. Again, a disclaimer cannot be used to convert an insufficient description into a sufficient one: *In re Johnston's Patent.* (1)

There is clearly an ambiguity in regard to the waterproof material to be applied. Claim 4 imports for the first time the milling of the semi-rubbery mass and therefore the earlier claims relate to the mass before milling. This difficulty would not be got over by omitting "semi-rubbery" from the expression "soft semi-rubbery mass" in the body of the specification. This ambiguity is fundamental.

Similarly, "friction calendering" in the specification may mean that friction is to be applied between the middle and bottom rollers as well as between the upper and middle rollers. This would be fatal to the invention. The amendment sought to be made by defining "friction calendering" in the sense required by the inventor would change the invention, and the amendment ought to be refused. The appeal should be dismissed.

Heald K.C. in reply.

Cur. adv. vult.

1937. Nov. 26. The judgment of the Court (Sir Wilfrid Greene M.R., Romer and MacKinnon, L.JJ.) was read by Romer L.J.

Romer L.J. This is an appeal from an order made by Luxmoore J. affirming the revocation by the Assistant Comptroller of the appellants' patent No. 387,125, on the application of the respondent made under the provisions of s. 26 of the Patents and Designs Acts, 1907 to 1932. The powers of the Comptroller under that section are stated under sub-s. 2 thereof to be as follows: He "may make an order "revoking the patent or requiring the specification relating "thereto to be amended by disclaimer, correction or explana-"tion, or dismissing the application; but the Comptroller "shall not make an order revoking the patent unless the "circumstances are such as would have justified him in

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(1) (1896) 13 R. P. C. 659, 661.

"refusing to grant the patent had the proceedings been "proceedings in an opposition to the grant of a patent."

Now the grounds upon which the Comptroller may refuse to grant a patent after acceptance of the complete specification are strictly defined in s. 11, sub-s. 1, of the Act, in paras. (*a*) to (*c*), the enumeration of the grounds concluding with these words: "but on no other ground." The only one of the grounds there stated that is material to the present case is that in para. (*c*): "that the nature of the invention or the "manner in which it is to be performed is not sufficiently or "fairly described and ascertained in the complete specifica-"tion." It was on this ground that the Assistant Comptroller revoked the patent in the present case, and was upheld by Luxmoore J. in so doing. Both before the Assistant Comptroller and before the learned judge the appellants unsuccessfully sought leave to amend the specification in various particulars which it is unnecessary to mention in detail inasmuch as before us the appellants confined their application to amend to two matters that will be mentioned in a later part of this judgment. For the present we will consider whether the nature of the invention and the manner in which it is to be performed are or are not sufficiently and fairly described in the specification as unamended, and for that purpose the specification must be considered in some detail.

The specification is entitled: "Improvements in or relating "to waterproof fabrics and the production thereof," and the invention is described as one that provides a waterproof fabric possessed of certain definite, distinctive and novel characteristics. The specification then goes on to indicate what these characteristics are. It states that at the date of the invention the waterproof properties of liquid coating compositions such as reaction condensation products having resin characteristics were well known, and that it had been proposed to make fabrics waterproof by treating them with reactive resinous materials, the liquid coating composition being generally applied by dipping or by spraying, a process that was more or less satisfactory where relatively heavy

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gauge or non-uniformity of thickness of coating was of no moment, and where stiffness or tackiness were not problems.

The patentees then state that attempts to perfect the practice by calendering had failed because none of the known materials would lend themselves to known methods of calendering, and set out the nature of their invention and the characteristics that will be possessed by a waterproof fabric made in accordance with such invention. "The nature "of the invention," they say, "resides in the method, and "in the product of that method, which in one aspect consists "in the selection and treatment of a reactive resin composition "to condition it for successful application by calendering or "otherwise, and in another aspect consists in the method of "calendering, or in short, proper application of that material, "for the ultimate purpose and result of producing a waterproof "fabric, characterized by its marked flexibility, uniformity of "gauge or thickness, and by its stability and freedom from "tackiness over long periods of time regardless of exposure to "different temperature conditions."

The words "or otherwise" in this passage seem to suggest that the patentees contemplated making a claim to cover the reactive resin itself in whatever way it might be applied. There is no such claim, however, in fact, and the words can be disregarded. The invention, therefore, is of a method of making a waterproof fabric and of the product of that method, the method consisting in the selection and treatment of the waterproofing material and in the calendering of that material on to the fabric to be made waterproof.

At this point it is necessary to explain what is meant by the term "calendering" as used in connection with the waterproofing industry. It is the name applied to a process carried out by a machine in which three revolving rollers are placed vertically one above the other. The waterproofing material is passed between the upper and middle rollers and emerges from them in sheet form. It is then passed, together with the fabric that is to be made waterproof, between the middle and the bottom rollers, for the purpose of causing the sheet to adhere to the fabric. Sometimes two adjacent rollers are moving, as they can be made to move, at different speeds. In such a case there will be friction between such two rollers.

Returning to the specification it will be found that the patentees state that in the practice of the invention considerable care should be exercised in preparing the proper coating material and in properly treating it so that it will readily lend itself to successful application, meaning by that successful friction calendering. This is the first use in the specification of the term "friction calendering." As we have already indicated, there may be in a calendering machine friction between the two upper rollers and also between the two lower rollers or between one of such pairs of rollers and not between the other pair. In the case of calendering when there is friction between the two upper rollers only, we should have thought that the calendering operation as a whole might well be described as friction calendering in spite of the absence of friction between the two bottom rollers, that is, the rollers that cause the sheet of waterproofing material to adhere to the fabric. Whether the patentees have so used the term or whether they intend by the term to indicate the existence of friction between the two bottom rollers as well, is a question in controversy between the parties to this appeal. In the passage to which we have just referred it is the application of the coating material to which the term is applied, and it is said by the respondents that this indicates that friction is contemplated as occurring in the last stage of the calendering operation, that is to say, the stage in which the coating is applied to the fabric which is brought between the two bottom rollers, and not merely in the first stage of the operation where the coating material is made to assume a sheet form that can be then made to adhere to the fabric.

The only other reference to friction calendering to be found in the body of the specification is in the following passage. Dealing there with the waterproofing material the patentees say: "A mass of the unformed amorphous material from the "cold rolls is then friction calendered on to a base such as "cloth." This again, it is argued, indicates that the friction referred to is used in the later phase of the calendering operation. But the whole calendering operation is one by means of which a coating material, not yet in sheet form, is applied to—that is to say is made to adhere to—the fabric, and the operation consists of two steps. The coating material is passed between the two upper rollers. These two rollers move at different speeds, and by the friction thereby engendered the coating material is made to assume a sheet form, and in that form passes between the two lower rollers. The application of the coating material to the fabric is therefore accomplished by two steps, each step being an essential part of the calendering. In these circumstances we are of opinion that the coating material may properly be said to be applied to the fabric by friction calendering, or to be "friction calendered" on to the fabric, even when there is no friction between the two bottom rollers. In other words, the term "friction calender-"ing" does not necessarily import that the two bottom rollers are to be revolved at different speeds. It does not, on the other hand, necessarily exclude the case of calendering with friction between both the two pairs of rollers, and must therefore in our opinion be regarded as covering both cases. It was indeed contended on the part of the patentees that the evidence showed that, to those engaged in the relevant art, the term "friction calendering" included friction between the two upper rollers only. But in our opinion the evidence is not sufficient to allow this contention to prevail. A more plausible argument in favour of reading the term as used by the patentees in this particular specification as excluding friction between the two bottom rollers is this: that the purpose of such friction is to force the plastic material into the fabric whereas, according to the patentees' invention, the plastic material is "substantially" confined to the surface of the fabric (see claim 1). "It is characteristic of the new "product thus obtained," say the patentees in their specification, "that the cohesion or binding action between the "foundation fabric and the coating is of such nature that there "is controlled penetration into the interstices or voids of the "foundation fabric, generally just sufficient penetration being

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"permitted to hold to the fabric surface and without penetration into the fibres of the fabric itself." This certainly suggests that any friction between the two bottom rollers must be quite small, but it does not seem to us to exclude such friction altogether. The friction has, no doubt, to be controlled, and if as much penetration as is desirable can be obtained without such friction then it will be controlled to the point of extinction. But nowhere in the specification do the patentees expressly state that no such friction is required or desirable, and we can find no justification for treating any such statement as being necessarily implied.

Returning once more to the body of the specification, there will be found a description of the various ways in which a suitable coating material may be obtained, and a description of the way to prepare one such material in particular, from which, say the patentees, "excellent results have been obtained." The passage concludes with these words : "The product when "run through a filter press is a soft semi-rubbery mass having "an odour strongly suggestive of ammonia." This description of the product does not appear to be entirely apt. It would "more correctly be described," says Dr. Bender in his statutory declaration, "as a sticky semi-fluid." The patentees accordingly asked us to allow them to amend the specification by omitting the word "semi-rubbery." But the fact that the product would be "more aptly" described if this word were omitted is not of much importance, seeing that the patentees give directions as to how it is to be made. The truth is that the patentees desire the amendment not for the purpose of making the description of the product more apt, but for the purpose of lending force to their argument that the "semi-"rubbery" mass referred to in claims 1 and 2, and the "material in a semi-rubbery state" referred to in claim 3, is not the product in question, but is that product after it has been submitted to a further mechanical treatment such as milling or kneading, which the patentees say is "desirable if "not essential."

But this argument is untenable in view of claim 4. [His Lordship read claim 4.]

Now in this claim the "semi-rubbery mass" must be referring to the "phenolic resinoid material . . . .in a sub-"stantially non fugitive or semi-rubbery state" referred to in claim 3; and as the claim only differs from claim 3 in that the semi-rubbery mass is first treated by working or milling, it necessarily follows that the phenolic resinoid material in claim 3 is the "soft semi-rubbery mass" referred to in the body of the specification. This being so, the "non fugitive or "semi-rubbery mass" referred to in claim 1 and the semi-"rubbery mass" referred to in claim 2 would in each case appear to be the same "soft semi-rubbery mass." For there is nothing whatever to indicate that the phenolic resinoid material to be used in the method claimed by claim 3 is in any way different from the phenolic resinoid coating of the flexible fabrics that are the subject of claims 1 and 2.

There seem, on the other hand, to be equally cogent reasons for contending that the semi-rubbery mass referred to in claims 1 and 2 and the filming material referred to in claim 3 are not the product described as a soft semi-rubbery mass mentioned in the specification, but that product after it has been subjected to milling. For the patentees state in the specification that the product which they have described as a soft semi-rubbery mass will, when in the form of a thick viscous varnish, penetrate into fibrous structures and modify their flexibility. When set to a thin gel, on the other hand, it does not indeed penetrate but swells in solvents to give a dry surfaced gelled mass which is difficult to knife-spread, and if sufficient solvent combination is used to break the gel structure the mixture is very dilute and sticky. "In fact," say the patentees, "the material is so peculiar in its properties and "behaviour that it is desirable, if not essential, to subject it "to mechanical treatment, as by milling or kneading, to break "it down."

Now as we understand these statements the patentees are pointing out that unless the product which they call a "soft "semi-rubbery mass" is subjected to the mechanical treatment it will do the very thing that the invention is designed to avoid. The mass will not, after the calendering operation is performed, be substantially confined to the surface of the fabric; and this is in accordance with what Dr. Bender says as to the product in question. It would, he said, be more aptly described as a sticky semi-fluid. In this connection we would like to refer to paras. 5 and 6 of the declaration of Dr. Bender of January 30, 1935. Dealing with the art prior to the patentees' invention, he says: "It was not known how to "keep a flexible phenolic resinoid coating substantially confined "to the surface of the fabric, that is, to have it so that though "it might penetrate to a certain extent into major interstices "or voids of the fabric in order to secure a proper anchorage, "it would not exist to any substantial extent in minute inter-"fibrous spaces such as between the fibres of the threads or "between adjacent fibres at the crossings of the threads of "woven fabrics. The reason why the phenolic resinoid "coating inevitably penetrated the fabric to an extent "impairing the inherent flexibility of the fabric was due to the "fugitive character of the resinoid material, having regard "not only to the condition of fluidity or semi-fluidity necessary "for its formation into films by the known methods, but also "to the fact that the resinoid itself, being in the fusible stage "when applied became fluid and fugitive during the subsequent "cure. Thus in the methods commonly practised the "phenolic resinoid would be applied by dipping, spraying, "brushing, print-rolling or knife spreading or equivalent "operation requiring the resinoid to be in a state of fluidity "or semi-fluidity which state might be obtained by fusing the "resinoid, but would more generally be obtained by using a "liquid vehicle such as a fugitive or volatile solvent."

Now it is to be observed that the words "non fugitive" appear in both claims 1 and 3. They are omitted from claim 2, but this may be due to a mistake. In these circumstances it would, it is argued by the patentees, be wrong as a matter of construction to treat the semi-rubbery mass referred to in claims 1, 2 and 3 as being the "soft, semi-rubbery mass" referred to in the body of the specification, which, being semi-liquid, is of a fugitive nature. We feel the force of this argument. The words "non fugitive" do seem to indicate that the filming material with which claims 1 and 3 are concerned is not the product described in the specification as a soft semi-rubbery mass. But, on the other hand, claim 4 indicates equally clearly that it is. In these circumstances it is quite impossible to say that the nature of the patentees' invention is sufficiently and fairly described in the complete specification; and it is obvious that an amendment of the specification by the omission of the word "semi-rubbery" in the body of the specification will not help matters. Whatever name be applied to the product in question, the specification will still contain the two mutually contradictory indications that the waterproofing material covered by the first three claims is and is not that product without it having been subjected to the milling operation. This is sufficient to dispose of the appeal. The patentees have failed to describe sufficiently and fairly the nature of their invention and the manner in which it is to be performed.

This appears to have been the view taken by the Assistant Comptroller and Luxmoore J. But they also thought that the patent ought to be revoked on the ground that even as regards the calendering operation the patentees had failed to describe sufficiently and fairly the nature of their invention. Their view, stated shortly, was that the patentees had not made it clear whether in the calendering operation there was, or was not, to be friction between the two bottom rollers. We are not prepared to take this view. For the reasons we have given in an earlier part of this judgment, we think that according to the true construction of the specification the patentees have indicated that there may be some such friction for the purpose of securing the controlled penetration of the coating into the interstices or voids of the foundation fabric without penetration into the fibres of the fabrics itself, this being what we understand the patentees to mean in claim 1 by the coating being substantially confined to the surface of the fabric. On the other hand, we cannot find that they have excluded the possibility of any such friction. In other words, we are of opinion that the patentees' claims on their true construction cover both the case of calendering with friction between the bottom rollers and the case of calendering without it, according to the amount of penetration desired. It is true that there seems to be ground for thinking that, in order to get the limited penetration that constitutes the characteristic feature of their invention, there must in fact be no friction between the bottom rollers at all. If this should prove to be true, then in an action in which the validity of the patent came into question, the patent should be declared to be invalid on the ground of want of utility. The calendering with friction between the bottom two rollers would not give the desired result. But in our judgment the patent could not be revoked on this ground by proceedings taken under s. 26 of the Act.

A practice appears to prevail in the Comptroller's office, in the case of opposition proceedings under s. 11 of the Act, and of proceedings under s. 26 of the Act, of taking into consideration a matter that can only properly be considered in proceedings to obtain revocation of a patent by the court under s. 25, that is to say want of subject-matter. In our judgment this practice is in direct conflict with the express provisions of the Act. As we have already pointed out in an earlier part of this judgment, the grounds upon which opposition proceedings under s. 11 may be based are specified with particularity in that section, the enumeration concluding with the words "but on no other ground." In proceedings under s. 26 the Comptroller is in terms prohibited from acting on any other grounds. He may not make an order revoking the patent "unless the circumstances are such as would have justified "him in refusing to grant the patent had the proceedings been "proceedings in an opposition to the grant of the patent."

Now among the grounds specified in s. 11 neither want of utility, prior user nor subject-matter are included. On the other hand, the grounds on which the Court may revoke a patent are set out in sub-s. 2 of s. 25, and all the matters just referred to are there included. Their omission from s. 11 is significant and must have been intentional. Nor is the reason for their omission far to seek. Questions of utility, prior user and subject-matter as a rule depend for their solution upon the proper conclusion to be drawn from the conflicting oral evidence of experts in the relevant art, and such evidence would be wholly out of place in proceedings before the Comptroller. The practice to which we have referred should, therefore, be discontinued. Justification for the practice is thought to be afforded by the decision of the Divisional Court in the case of *The King* v. *Comptroller-General of Patents. Ex parte Muntz.* (1) But, in truth, that case when closely examined in no way justifies the practice. In that case the Comptroller's representative had refused to accept an application for letters patent, and the applicant had obtained a rule nisi for a mandamus addressed to the Comptroller or his representative to hear and determine the application according to law. The rule nisi was granted upon the ground that the Comptroller had exceeded the jurisdiction given him by the Acts by deciding that the invention claimed was not a "manner of new manufacture," or, alternatively, while purporting to decide the case upon the said ground by, in fact, deciding the case upon the ground of want of subject-matter.

But upon showing cause against the rule the Comptroller's representative stated on affidavit that the ground on which he had refused acceptance of the complete specification was that the applicant was claiming a patent for a mere idea. In other words, that the patent sought was not one for a manner of manufacture. He said: "It is submitted that the Comptroller-"General has an inherent jurisdiction to refuse the grant of "Letters Patent under the seal of the Patent Office on an "application in which the complete specification filed in con-"nection therewith does not disclose an 'invention' which is "a 'manner of manufacture' within the meaning of section 6 "of the Statute of Monopolies, and an 'invention' within the "meaning of this word as used in the Patents and Designs "Acts, 1907 and 1919. In making my said decision I did not "in any way take into account any considerations as to the "novelty of the said alleged invention. The question of "novelty did not arise. I am not sure in what sense the said "William Edgar Muntz uses the phrase 'want of subject-

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(1) 39 R. P. C. 335.

" 'matter' in paragraph 3 of his said affidavit. If he uses it, "as he appears to do, in the sense in which these words are "ordinarily used by His Majesty's judges in deciding issues as "to the validity of letters patent, namely, that the new matter "(if any) disclosed and claimed in a patent specification did "not require any act of invention, then I deny that my "decision was in any way based upon the ground of 'want of " 'subject-matter.' "

The deponent was not therefore seeking to justify any such practice as that we have referred to above. He was merely contending, and rightly contending, that inasmuch as the specification on the face of it disclosed an idea only and not a manner of manufacture, there was no disclosure of an invention within the meaning of the Act. For invention is defined by s. 93 of the Act as follows: "Invention means any manner "of new manufacture the subject of letters patent and grant "of privilege within s. 6 of the Statute of Monopolies . . . . "and includes an alleged invention." It was on these words "alleged invention" that the contention of the applicant was based. If he, the claimant for a patent, alleged that he was in possession of an invention, it was not for the Comptroller, so it was argued, to investigate the truth of that allegation. It was this contention that was rejected by Lord Hewart L.C.J. After referring to the definition of the word invention in s. 93 he said this (1): "When one turns to the Statute of "Monopolies . . . . . there it is made plain that what is spoken "of as an invention is 'some manner of new manufacture,' "and, although in the Act of 1907, as indeed in the Act of 1883, "the words 'alleged invention' were employed, it is quite "clear, as has been declared by more than one law officer, "and as one would expect apart from any expression of "opinion in any quarter, that the word 'alleged' in this "definition goes only to the epithet 'new' and does not make that "an invention which is not a manner of new manufacture, but "which the alleged inventor chooses to describe as an invention."

With these observations of the Lord Chief Justice we desire to express our respectful concurrence. The question whether

(1) 39 R. P. C. 339.

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or not a specification discloses a manner of manufacture is one for the Comptroller. The question whether, apart from prior publications and prior claims such as are specifically dealt with in sub-paras. (*b*) and (*bb*) of sub-s. 1 of s. 11, the manner of manufacture is "new" is not one with which the Comptroller is concerned, as has been very clearly pointed out by Sir Stafford Cripps, when Solicitor-General, in the case of *In re Compagnies Réunies des Glaces, &c.'s Application.* (1) In other words a manner of manufacture alleged to be new is an invention within the meaning of the Act. The truth of that allegation is a matter that can only be inquired into by the court on a petition for revocation or in an action for infringement. This does not, however, mean that the Comptroller is bound to accept the allegation of the applicant that his method of manufacture is new if it is apparent upon the face of the specification, when properly construed, that the allegation is unfounded. In order to construe the specification properly the Comptroller must, of course, have regard to the meaning that would be attributed to its language by those skilled in the relevant art and for the purpose of ascertaining such meaning is entitled to receive evidence. But if the specification when so construed shows that the applicant is claiming a manner of manufacture that he alleges to be new, and the specification when so construed does not itself show that allegation to be unfounded, evidence directed to establishing want of subject-matter or want of utility or prior user is not permissible.

One further matter remains to be mentioned. The patentees in the present case have failed to describe sufficiently and fairly the nature of their invention and the manner in which it is to be performed in that it is impossible to ascertain on the face of the specification what is the waterproofing material with which their invention is concerned. Had they described and ascertained that material sufficiently and fairly it would have become necessary to consider the application made to us on behalf of the appellants for leave to amend the specification by inserting the following words: "The expression 'friction

(1) 48 R. P. C. 185.

"'calendering' when used in this specification means an "operation employing rolls to form under a friction rolling "action from a plastic coating composition a coherent sheet "or film of substantially uniform thickness or gauge, and to "apply such sheet or film by a rolling action without friction "on to a foundation fabric."

As the application raises a question of considerable general importance it is desirable, even though it is not strictly necessary, that we should say something about it.

We have already expressed our opinion that by the term "friction calendering" the specification includes calendering either with or without friction between the two bottom rollers in addition to friction between the two upper rollers. Whether so construed, the patent could be invalidated on the ground of want of patentable utility is a matter with which we are not concerned at this stage for the reasons that we have already given. But under s. 26 of the Act the Comptroller has power to require the specification to be amended by disclaimer, correction or explanation. He therefore has power, and the court on this appeal has power, to allow the appellants to amend their specification by confining the friction calendering to the case where there is friction between the two upper rollers only. For such an amendment would, in our judgment, be properly described as an amendment by way of disclaimer. It is argued, however, on behalf of the respondents that such an amendment would make the specification as amended claim an invention substantially different from the invention claimed by the specification as it stood before the amendment, within the meaning of sub-s. 6 of s. 21 of the Act. That is the section which enables an applicant after acceptance, or a patentee at any time, by taking the proceedings therein mentioned, to amend his specification by way of disclaimer, correction or explanation. Sub-s. 6 of the section is in these terms: "No "amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger "than or substantially different from the invention claimed by "the specification as it stood before the amendment."

A similar restriction is contained in the proviso to s. 22, which is the section that enables the Court to allow an amendment in an action for infringement or in proceedings for revocation.

Two questions arise upon this argument of the respondents. The first is whether a similar restriction on amendment applies to an amendment made under the powers conferred by s. 26. The second is whether, if the restriction does so apply, the particular amendment is inadmissible. In our judgment the first question must be answered in the affirmative. It was so answered by Luxmoore J. in the case of *In re Eveno's Patent* (1), with whose decision we respectfully agree. It appears, however, that in proceedings under s. 11 it is the practice of the Comptroller to allow amendments without any such restriction. It is accordingly argued on the appellants' behalf that if a particular amendment would have deprived the Comptroller of justification for refusing to grant the patent in proceedings under s. 11, the same amendment must necessarily be admissible in proceedings under s. 26, since the Comptroller is forbidden by the latter section to revoke a patent unless the circumstances are such as would have justified him in refusing to grant the patent. The argument is sound if the assumption upon which it is founded be sound, that is, that in opposition proceedings under s. 11 amendments of any kind are permissible. In our judgment the assumption is without justification. Under s. 11 no express powers of amendment are given to anybody, and though we do not desire to throw any doubt upon there being an implied power in the Comptroller to allow amendments in opposition proceedings, such implied power must, we think, be treated as being subject to the same restrictions as are imposed by the two sections of the Act in which powers of amendment are expressly given.

The second of the two questions arising upon the proposed amendment must, in our judgment, be answered in the negative. The permissible amendments in terms include an amendment by way of disclaimer, and such an amendment must in many cases make the invention substantially smaller than the invention as originally claimed. But this degree of difference from the invention as originally claimed is impliedly permitted both by reason of the word "disclaimer" and by reason of the express prohibition of an amendment that will make the invention "substantially larger." Except for this permissible degree of difference the amendment would not make the invention "substantially different" from the one originally claimed. As it is, however, the proposed amendment, though it would have been permissible in happier circumstances, cannot now avail the patentees.

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(1) 49 R. P. C. 385.

The appeal must be dismissed with costs.

Appeal dismissed.
Leave to appeal to the House of Lords was given.

Solicitors: *R. G. Harrison; Cedric H. Akaster.*

H. C. G.

FARWELL J.

1937 Dec. 2, 3.

In re NICHOLSON'S SETTLEMENT.

MOLONY *v.* NICHOLSON.

[1937. N. 523.]

Settlement—Power to appoint income of a fund for life in favour of a husband—Appointor wishing to benefit friends—Marriage of appointor when over eighty years of age—Exercise of power—No arrangement between appointor and appointee that appointee should use money for benefit of any one but himself—No fraud on the power.

Where an appointor under a settlement has power to appoint the income of a fund in favour of one object only and exercises the power, it is necessary, in order to set aside the exercise of the power as a fraud on the power, to prove that there was some arrangement between the appointor and the appointee that the appointee should use the income or part of it for the benefit of some person or persons other than himself.

ADJOURNED SUMMONS.

On March 4, 1882, Elizabeth Ismay Nicholson, in conjunction with her children, made a settlement of certain property belonging to her. Under the settlement the income of the settled fund was to be paid to E. I. Nicholson for her life and on her death one-ninth part thereof was to be paid to each of her sons, Herbert I. Nicholson, Francis I. Nicholson, Cuthbert I. Nicholson, Gerald Nicholson, Gilbert H. Nicholson and Hugh S. Nicholson, and three one-ninth shares were to be held in trust for her daughters, Edith E. Nicholson, Esther S. Nicholson, and Martha M. Nicholson, for life, without power of anticipation, and on their death in trust for their issue as they should appoint, and in default of appointment in trust for their children in equal shares, with an ultimate gift over, in the event of there being no children, to the other beneficiaries. There then followed a proviso: "Provided "always and it is hereby further agreed and declared that "it be lawful for any of the respective hereinbefore named "three daughters of the said Elizabeth Ismay Nicholson "notwithstanding any coverture or whether covert or sole "by any deed or deeds or writing or writings sealed and "delivered with or without power of revocation and new "appointment or by will or codicil to appoint that after her "own death all or any part of the dividends, interest and "income of her said portion or share or of so much thereof "as shall not have been or shall not be applied under any of "the trusts or powers of maintenance, education and advancement hereinafter contained shall be paid to any husband "who may survive her for his life or for any less period and "upon such conditions and with such restrictions and in such "manner as she shall think fit."

Elizabeth I. Nicholson died on October 2, 1897. Esther S. Nicholson died, without having been married, on November 18, 1929, and Martha M. Nicholson died, without having been married, on January 28, 1930. Edith E. Nicholson had for some years lived with a family in Oregon, in the United States of America. In 1933, when she was over eighty years of age, she became very anxious to make some provision for the family with whom she lived. She had, however, no means beyond the income she received from her settled share. She then began a correspondence with the solicitors who acted for the trustees of the settlement and for the family generally. In the course of that correspondence she sought to make a bargain with her relations that, if she were to release the power of appointment given to her in the proviso in the settlement, they should give up half of the capital, so that she might be free to dispose of that in the way she wished. Her relations, however, were not prepared to do that, notwithstanding the fact that she held out to them the possibility that if they would not agree she would marry and exercise her power of appointment. She did, in fact, marry in May, 1934, one Norris Quatermas. They never lived together, she continuing to reside with her friends and he with his sister. By a deed dated July 5, 1934, she exercised the power of appointment, given to her by the proviso, in favour of her husband. She died on September 6, 1936.

In these circumstances the plaintiff, who was, with one of the defendants, a trustee of the settlement, issued this summons, which raised the question whether or not the deed of

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Nicholson's Settlement, *In re.*
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July 5, 1934, was a fraud on the power of appointment given by the proviso in the settlement.

J. H. Sparrow (*J. S. Foster* with him) for the plaintiff.

Hon. B. L. Bathurst for legal personal representatives of H. I. Nicholson, F. I. Nicholson, C. I. Nicholson and G. Nicholson. It is clear in this case that the appointor desired to benefit her friends and that, taken in conjunction with the circumstances surrounding her marriage and exercise of the power, suggests that in some way the exercise of the power was intended to benefit her friends. It is well settled that if an appointor exercises a power of appointment with the intention of benefiting some one other than the appointee, such exercise of the power is a fraud on the power. It is stated in Farwell on Powers, 3rd ed., p. 477, para. 7 (*c*), that: "The execution is fraudulent and void if made for purposes "foreign to the power, although such purposes are not com-"municated to the appointee previously to the appointment, "and although the appointor derive no personal benefit," and on p. 478 *Topham* v. *Duke of Portland* (1) and *In re Marsden's Trust* (2) are dealt with.

[Farwell J. referred to *Cockrane* v. *Cockrane* (3), where it was held that an appointment might be invalidated by the circumstances in which the deed of appointment was executed.]

That is the principle that applies here. The evidence here shows that the appointor did desire at one time to benefit some persons outside the power, and the onus is on the person upholding the validity of the appointment to show that she changed her mind in this respect: *In re Wright.* (4)

Roger Turnbull for legal personal representatives of H. S. Nicholson.

J. V. Nesbitt, for legal personal representatives of G. H. Nicholson, referred to the judgment of Lord Parker of Waddington in *Vatcher* v. *Paull.* (5)

(1) (1863) 1 D. J. & S. 517.
(2) (1859) 4 Drew. 594.
(3) [1922] 2 Ch. 230.
(4) [1920] 1 Ch. 108.
(5) [1915] A. C. 372, 378.

Cyril Radcliffe K.C. and *Geoffrey Cross* for N. Quatermas. There is no evidence of any kind to show that the appointor ever suggested to the appointee that he should use the income of the fund for the benefit of her friends or any one other than himself. There can, therefore, be no fraud on the power.

FARWELL J. This summons raises a question whether the exercise of the power of appointment, dated July 5, 1934, is a good exercise of the power or whether it is void as a fraud on the power.

In the circumstances above mentioned it is said that the exercise by the lady of the power of appointing the income to the husband is invalid on the ground that it was a fraud on the power. As I understand the argument, it is said that because there is evidence that the lady desired to benefit her friends and sought to make a bargain with her relations to release her power to appoint to a husband, in consideration of obtaining a share of the capital out of which she could give her friends a benefit, the appointment must be taken to have been made for the purpose of enabling the friends to be benefited and that, therefore, it was a fraud on the power. I have evidence before me, which is not disputed, that there was never any sort of bargain or arrangement of any kind whatsoever made between the lady and her husband as to how he would deal with the income if and when he got it. There is evidence from the husband and there is evidence from Mr. Souther, who was a friend of the husband and was also one of the people whom the appointor desired to benefit, that there was no bargain of any kind or anything done or said to fetter the husband in any way in dealing with the property exactly as he liked. Under those circumstances it appears to me to be absolutely impossible to suggest that there was anything like a fraud on the power in this case. I think that those who seek to impeach this appointment fail to recognize the perfectly clear distinction in such cases between motive and purpose. The question of a fraud on a power of appointment where there is one object and one object only of the power, differs widely from the question of a fraud on a power by which the fund can be given to one or more of several objects. Where there is one object only of the power it is impossible to establish a fraud unless there is evidence of some arrangement or bargain between the appointor and the appointee, not necessarily a legal bargain, but some arrangement under which the appointee is to give effect to the purpose of the appointor to benefit some one other than himself. The matter is a totally different one when the appointor has power to select among a class. In such a case it matters not that the appointee did not know of the improper motive, and there is no necessity to prove an arrangement. In this case it is quite plain the lady had a very strong wish and desire to benefit her friends, but she found she could not do so. Thereupon she married this gentleman and exercised the power which she had to appoint in his favour, but not under any arrangement with him under which her friends were to be benefited. There being no evidence that the appointee was under any legal or moral obligation of any sort or kind to use the money in any way except as he chose, the attempt to establish a fraud on the power breaks down completely, and I must accordingly declare, subject to proper proof of marriage, that the exercise of the power is a valid exercise and must be acted upon accordingly.

Solicitors: *Frere, Cholmeley & Co.*; *Blyth, Dutton, Hartley & Blyth*; *Preston, Lane-Claypon & O'Kelly, for Hazel & Baines, Oxford*; *Freshfields, Leese & Munns.*

P. J. B.

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Jan. 12.

In re WYLES.

FOSTER *v.* WYLES.

[1937. W. 3824.]

Will—Construction—Legacies—Certain legacies to abate in event of estate being insufficient to pay all—Estate insufficient—Legacies not paid within one year of testator's death—Whether interest to be added to legacies benefiting by direction.

A testator by his will bequeathed legacies to several persons including W. N. W. and C. D. W., directing that, in the event of his residuary estate being insufficient to pay them, those of W. N. W. and C. D. W. should abate equally in priority, to the intent that all other legacies should be paid in full. The estate proved insufficient to meet the full amount of the legacies, which were not paid within one year after the testator's death:—

Held, (1.) that the interest payable to a legatee from one year after a testator's death on the amount of a legacy not paid by that date did not itself amount to a legacy, but was a sum paid in the course of administration.

(2.) that, accordingly, the legacies bequeathed to W. N. W. and C. D. W., having abated to provide for payment in full of the other legacies, should not abate further to provide for the payment of interest thereon.

ADJOURNED SUMMONS.

By his will dated April 5, 1928, and a codicil dated March 13, 1929, Henry Wyles, the testator, who died on March 15, 1929, bequeathed (inter alia) a large number of pecuniary legacies. Amongst those bequeathed by his will was one of 3000*l.* to his nephew, Walter Nelson Wyles, and another of 1000*l.* to his nephew, Christopher Douglas Wyles, and amongst those bequeathed by the codicil was an additional legacy of 4000*l.* to Christopher Douglas Wyles. The testator by his will bequeathed the residue of his estate to trustees on trust for sale and conversion, directing them to pay thereout his funeral and testamentary expenses, death duties and debts and the pecuniary legacies bequeathed by his will or any codicil thereto together with legacy duty in respect of those legacies which were bequeathed free of legacy duty and to stand possessed of the remainder thereof on certain

Reported by F. H. Cowper, Barrister-at-Law.

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trusts. The will contained the following provision: "I declare "that if the moneys to arise from the sale and conversion "hereinbefore directed or otherwise forming part of my "residuary estate shall not be sufficient to pay my funeral "and testamentary expenses, my trust expenses and the "whole of the legacies and trust sums hereby bequeathed "and the death duties payable in respect of my estate and "the legacy duties in respect of such of the legacies and trust "sums as are hereinbefore given free of legacy duty, then "and in such case the pecuniary legacies hereinbefore given "to my two nephews, Walter Nelson Wyles and Christopher "Douglas Wyles (they being otherwise well provided for) "shall abate equally and in priority to the other legacies to "the intent that all pecuniary legacies and trust sums herein-"before given in favour of other legatees and all Government "duties payable under the terms of this my will shall be "paid in full before any payment is made in respect of the "said pecuniary legacies given to the said Walter Nelson "Wyles and Christopher Douglas Wyles." The total amount due to the legatees was 12,967*l.* 10*s.* and the estate proved insufficient to meet this sum by more than 2700*l.* The legacies were not paid within one year after the death of the testator.

The plaintiff, an executor and trustee of the will, took out this summons to determine whether interest should be added to the respective legacies entitled to the benefit of the direction as to abatement so as to be payable in priority to the pecuniary legacies subject to the burden of that direction. The summons having also asked (*a*) whether the legacy bequeathed by the codicil to Christopher Douglas Wyles was subject to the burden imposed by the direction as to abatement, and (*b*) whether the other legacies bequeathed by the codicil were entitled to the benefit of that direction, Farwell J. on the true construction of the will and codicil first answered both these questions in the affirmative.

E. B. Stamp for the plaintiff.

J. Bowyer for the testator's nephews. No interest is payable on the legacies. The interest ordinarily payable on a legacy not paid within one year after the testator's death does not form part of that legacy, but is a sum paid in the course of administration. The rule as to such payments arises from the necessity for doing justice as between the pecuniary legatees and the residuary legatees, and is based on the former having been prevented from investing their legacies. In the present case, since the estate is insufficient, no persons have derived any unfair advantage from the delay by receiving interest which the legatee should have received.

Roger Turnbull for the defendant, Violet Hole, a pecuniary legatee. The pecuniary legatees are entitled to interest. It is a well settled rule that a legacy carries interest after the expiration of one year after the testator's death if it has remained unpaid. That interest really forms part of the legacy. The terms of this will make it plain that the testator intended that these legacies should carry interest. The words "to the intent that all pecuniary legacies . . . . shall be paid "in full" have reference to both principal and interest.

P. Sykes for the defendant Thomas Wyles, another pecuniary legatee. If the estate had been sufficient to pay the legacies in full there is no doubt that interest would have been payable on them. The direction as to abatement preserves that right for the legacies entitled to the benefit of it.

FARWELL J. The testator in this case died in 1929. Owing to difficulties of administration it has not been possible till now to pay the legacies given by the will and codicil, which, in the ordinary course, had the estate been sufficient, should have been paid at the end of the executor's year. It is a well established rule that if a pecuniary legacy is for any cause not paid over to the legatee at the end of one year from the testator's death, the legatee is entitled to interest on his legacy from that date up to the date of payment. The reason for that rule is obvious. Where the estate is sufficient to pay the whole of the legacies in full, and there is a residue, it is unjust that the residuary legatees who are entitled to nothing until all the legacies have been paid, should benefit by the delay in paying them which they would do if the interest which the money has been earning in the meantime was paid to them, and therefore the legatees are entitled to interest on their legacies. But it is quite a mistake, in my judgment, to say that the interest payable to a legatee is in any sense a legacy given by the testator. It is a sum given in the course of administration to the legatee because justice requires that owing to the failure to pay his legacy in due time he should be put in the position in which he would have been had it been so paid; but it is not a bounty of the testator in the sense that a gift to a legatee of the amount of the legacy duty payable on the legacy is an additional legacy given by the testator.

In the ordinary case of an insufficient estate where there is no residue, and the legacies have to abate equally, no question of interest can arise, because there is no surplus out of which interest can be paid. Each legatee gets the amount of his abated legacy as soon as the estate is available for distribution. But in this case it is said that because the testator has thought fit to throw upon the two nephews to the extent of the legacies given to them the burden of any abatement necessary in respect of the other legacies given by the will or codicil, therefore those two nephews must bear not merely the amount required to pay the other legacies in full, but also interest on them as from a year after the testator's death.

I know of no case in which this precise question has ever been determined, but it seems to me, as a matter of principle, that it is not right to say that interest which is undoubtedly payable out of residue on a legacy as from a year after the testator's death is in any sense a legacy given by the testator; and if that be true, then there is nothing in the will or codicil to throw upon these two nephews the burden of providing, by a further reduction of their legacies, for something which is not a legacy or any part of a legacy. The legatees' right to interest (which is a matter of administration to prevent the injustice of the residuary legatees getting something which otherwise they could not get, merely because there has been a delay in distributing the legacies amongst the legatees) does not arise in a case of this kind, where some legacies have to abate in favour of those more fortunate legatees who get their legacies in full. In the circumstances, I propose to make a declaration that the interest on the pecuniary legacies is not part of that which ought to be set against the legacies given to the two nephews.

Solicitors: *Smith & Hudson, for Eking, Manning, Morris & Foster, Nottingham; George O. Meech, for Breeze, Wyles & Raggett, Epping.*

F. H. C.

BENNETT J.

1937 July 30.

In re LAWRY.

ANDREW *v.* COAD.

[1937. L. 1241.]

Will—Construction—Tenant for life—Superadded power of disposition—Exercisable by will.

A testator gave his residue equally between his two sisters "for their respective lives with full power to deal therewith as "if it were their own and on the death of either of them or in "the event of either or both of them predeceasing me then I give "and bequeath her or their share or shares" to X. One of the sisters of the testator died in his lifetime:—

Held, that the power of appointment, conferred on the other sister, who survived him, was an absolute power of disposing of one moiety of the residue and was exercisable not only inter vivos but also by will.

ADJOURNED SUMMONS.

By his will dated February 22, 1927, William Daniel Lawry, after giving and bequeathing his freehold house and furniture in manner therein mentioned, provided as to the remainder of his property as follows: "All the remainder of my property "both real and personal which I may be possessed of or "entitled to at the time of my death I give and bequeath unto "and equally between my said two sisters" [Caroline Lawry and Alice Jane Lawry] "for their respective lives with full "power to deal therewith as if it were their own and on the "death of either of them or in the event of either or both of "them predeceasing me then I give and bequeath her or their "share or shares to my said nephew William Bishop Andrew "absolutely."

The testator died on January 23, 1937. His sister Alice Jane Lawry predeceased him. His sister Caroline Lawry died on January 31, 1937, having made a will dated January 25, 1937, whereby after bequeathing various legacies she provided that: "all the rest and remainder of my estate and effects "after payment of my just debts funeral and testamentary "expenses and legacies and all legacy duties payable hereunder I give to the children of my nephew William Bishop "Andrew in equal shares."

This summons was taken out by the administrator of the estate of the testator with his will annexed, who also claimed to be beneficially interested thereunder, for the determination of the following questions (inter alia): (1.) Whether upon the true construction of the will of the testator and in the events which had happened the said Caroline Lawry was entitled: (i.) to a life interest in one moiety of the residuary estate of the testator without any power of appointment or disposition over the capital thereof: or (ii.) to such life interest as aforesaid together with a general power of appointment exercisable inter vivos only over (*a*) one moiety of the capital of the said residuary estate or (*b*) over the whole of such capital: or (iii.) to such life interest as aforesaid together with a general power of appointment exercisable either inter vivos or by will over (*a*) one moiety of the capital of the said residuary estate or (*b*) the whole of such capital.

D. Ll. Jenkins for the applicant. The question is whether the testator gave to his sister a general power of appointment under his will. If so it was exercisable only inter vivos. The testator appointed no executors or trustees of his will. Consequently he has set up a residuary fund of which his sisters are appointed trustees.

[He referred to *In re Shuker's Estate.* (1)]

A. H. Droop for the respondent, the executor of the will of Caroline Lawry. There is nothing in this will to indicate that the power is an administrative power. What is given on the death of the tenant for life is the whole share, not what is left of the share.

[He referred to *In re Thomson's Estate* (2); *In re Richards* (3); *In re Ryder* (4); *In re Shuker's Estate* (1); *Pennock* v. *Pennock.* (5)]

[BENNETT J. referred to *In re Jones.* (6)]

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(1) (1937) 3 All E. R. 25.

(2) (1879) 13 Ch. D. 144; 14 Ch. D. 263.

(3) [1902] 1 Ch. 76.

(4) [1914] 1 Ch. 865, 868.

(5) (1871) L. R. 13 Eq. 144.

(6) [1898] 1 Ch. 438.

The power conferred on the testator's sister Caroline is a power to appoint not only by deed but also by will.

BENNETT J. William Daniel Lawry made his will on February 22, 1927. [His Lordship read the will and continued :] He died on January 23, 1937. His sister Alice Jane Lawry predeceased him. She died on December 23, 1936. His sister Caroline survived him by eight days. She died on January 31, 1937, having made a will which, if it be proved and if she has a general power of appointment over the property given to her by her brother's will, will operate as an exercise of that power.

The plaintiff is the administrator with the will annexed of the testator's will and the defendant is the executor named in the will of his sister Caroline Lawry ; and the question is what were the powers which Miss Caroline Lawry had conferred upon her by her brother's will with respect to the remainder of the testator's property which was given and bequeathed by him " unto and equally between my said two "sisters for their respective lives with full power to deal there-"with as if it were their own and on the death of either of "them or in the event of either or both of them predeceasing "me then I give and bequeath her or their share or shares to "my said nephew William Bishop Andrew absolutely."

On behalf of the plaintiff the first point taken is that the power which the testator gave in his will to his sister Charlotte was merely an administrative power. I see no reason for limiting the power in that way. There is nothing in the language which leads to the conclusion that it should be so interpreted. The power is to deal with the property in which Caroline is given a life interest as if it were her own, and the person who has that power (in the absence of some words of limitation being implied) can do with the property anything which she pleases.

The second point taken is that, assuming that she has a power of appointment, the power is limited to an appointment which is to operate during the lifetime of the donee of the power and does not include a power of disposing of the property by will.

The foundation of the argument was the decision in *In re Thomson's Estate.* (1) The terms of the gift which gave rise to the question in that case were these: "for the term of her natural "life, to be disposed of as she may think proper for her own "use and benefit according to the nature and quality thereof," and "Secondly, in the event of her decease, should there be "anything remaining of the said property or any part thereof" the testator gave "said part or parts thereof" to certain persons.

Upon that will it was held by Hall V.-C. and by the Court of Appeal that the words of the testator conferred a life interest with absolute power of disposition exercisable by her during her lifetime but not by testamentary instrument.

That decision was the authority on which Mr. Jenkins for the plaintiff founded his argument that the power in this case should be held to be one which excludes a power of appointment by testamentary instrument.

If you look at the language of Hall V.-C. it becomes clear that the basis of his decision was the word "remaining." He says (2): "The words 'secondly, in the event of her decease "'should there be anything remaining of the said property "'or any part thereof' draw a line at the death of the lady, "so that what is 'remaining' at the moment of her death "becomes at that time the subject of the gift over and belongs "to the residuary legatees: 'remaining' is consistent with "there being a power of disposition other than a testamentary "power."

There is no such word in this will, and the power, which in my view is a beneficial power and not a mere administrative power, is one which gives the donee power to deal with the property in which the testator has given her a life interest as if it were her own.

One asks oneself this question: What can a person do with property if it be her own? Can she or can she not dispose of it by testamentary disposition? The answer is that she can do so. Ought this power to be cut down because the property is given to some one else after her death? I think

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(1) (1879) 13 Ch. D. 144; 14 Ch. D. 263.

(2) 13 Ch. D. 147.

BENNETT J.

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the answer to that is that any vested interest is liable to be defeated if the power is exercised. The interest in remainder must be subject to the exercise of the power by the donee of the power.

Therefore in my judgment there was given to this donee by the will of the testator not only a power of disposing of the property during her life, but also a testamentary power of appointment.

[His Lordship accordingly decided that Caroline Lawry was entitled to a life interest in one moiety of the residuary estate of the testator with a general power of appointment exercisable either inter vivos or by will over one moiety of the capital of the residuary estate.]

Solicitors: *Church, Adams, Tatham & Co., for G. J. Lee-Barber, Torquay; Hedley Norris & Co., for Peter & Gainsford, Looe.*

J. L. D.

SIMONDS
J.

1937
Dec. 15.

In re HARKER'S WILL TRUSTS.

HARKER *v.* BAYLISS.

[1937. H. 3532.]

Settlement—Will—Tenant for life and remaindermen—Power to cut timber for sale—Tenant for life let into possession—Larch plantations—Mature trees—Sale and felling—Larch not timber at law—Tenant for life entitled to proceeds of sale.

A tenant for life of land settled by will, which included plantations of larch, after having been let into possession by the trustees, entered into a contract to sell the trees on the plantations, which, being some forty years of age, were ripe for felling. The will devised the estates to the trustees with power to let the tenant for life into possession after she had attained the age of twenty-five years, and in the meantime to cultivate and manage them according to the custom of the district with full discretionary powers of cutting timber and underwood for sale:—

Held, that larch not being timber either at common law or by the custom of the district, the whole of the proceeds of sale belonged to the tenant for life, who was not bound to replant the plantations at her own expense.

In re Harrison's Trusts (1884) 28 Ch. D. 220 distinguished.

Summons.

By his will dated December 19, 1913, the testator, Joseph Simpson Harker, devised certain estates, described as his Crosthwaite and Tower estates, in Cumberland and Westmorland, upon trusts in favour of his daughter, Margaret Muriel, during her life, declared by reference to the trusts thereby also declared concerning other estates settled on his daughter Mary Harker. The devise in each case was to the trustees upon trust to cultivate and manage the estates according to the custom of the district with full discretionary powers of cutting timber and underwood for sale, repairs, or otherwise. The trustees were empowered, on each daughter attaining the age of twenty-five, to let her into possession of the estates settled by the will.

The testator died on November 16, 1914.

The testator's daughter Margaret Muriel married and became Mrs. Bayliss and had children. In 1925, she attained the age of twenty-five, and the trustees let her into possession of the Crosthwaite and Tower estates.

These estates included certain larch plantations, and in 1935 Mrs. Bayliss entered into a contract for the sale of the larch trees, which were then about forty years of age. The purchaser paid the purchase-money of 1407*l.* to the trustees, after which he entered and felled and carried away the trees.

The summons was taken out by the trustees to determine whether upon the true construction of the testator's will and in the events which had happened the trustees ought to pay the whole of the purchase-money of 1407*l.* to Mrs. Bayliss, or whether that sum ought to be apportioned, and if so in what manner, between capital and income. Mrs. Bayliss and her infant children were defendants to the summons.

N. S. S. Warren for the plaintiffs.

Hon. Denys B. Buckley for the defendant Mrs. Bayliss. The proceeds of sale of the trees belong to Mrs. Bayliss as tenant for life absolutely, and she is not bound to set aside any part, or to spend any money for replanting. Larch trees are not timber at common law, or by the custom of the district or the county of Westmorland. According to the evidence the trees were planted over forty years ago, and at the date of the contract for sale were ripe for cutting in due course of management. The land need not be replanted, but can be used for arable land or grazing. The Court would only impose a condition as to replanting if it came to the conclusion that there ought to be some equitable application or apportionment of the money.

In *Honywood* v. *Honywood* (1) Sir George Jessel M.R. said that a tenant for life could cut down trees and receive the whole value if they were not timber, but might be liable for waste. *In re Harrison's Trusts* (2) larch was held not to be timber, but the Court decided that there must be an equitable apportionment of the proceeds of sale of trees blown down in a heavy storm, as an accident could not be allowed to

(1) (1874) L. R. 18 Eq. 306.

(2) 28 Ch. D. 220.

interfere with the rights of the parties. The same principle was applied in *In re Terry* (1), where larch plantations had been cut down before they were ripe for felling, owing to the enormous demand and the enhanced price caused by the War; but neither of these cases applies to the present one, in which the larches were at the right age to be felled, and were yearly produce in due course of management. If the tenant for life had not been let into possession, the trustees would have sold the timber at about the same time, in which case the tenant for life would also have been entitled to the whole proceeds of sale.

See also *Dashwood* v. *Magniac* (2), where Lindley L.J. said: " Laying aside all custom . . . . this action would fail, "for the tenant for life would have done nothing wrong; "she cut beech in the ordinary course of good forestry, and, "apart from custom, that was not waste." And per Bowen L.J. (3): " The nearest analogy which can be invoked "to assist the case of Lady Dashwood's executors is to be "found in the law applicable to grants of minerals . . . . "Under certain circumstances, the consumption of a part of "the inheritance is not held to be waste. Cases in which the "usufructuary is allowed to treat minerals as annual fruits "or produce of the soil are common to ancient and modern "jurisprudence. The open mine is an instance, beginning in "the Roman, but familiar already to the English law as far "back as the reign of Edward III."

M. R. C. Overton for the infant defendants. The position is the same as if the trustees had the control and management of the property instead of having let the tenant for life into possession. The power to cut timber or other trees must be exercised in accordance with the custom of the district, and that custom is set out in the affidavit of Mr. Reed, one of the trustees of the will. It shows that the plantations on the estate, when cut down before, have been replanted, and the tenant for life, even if she is entitled to the proceeds of sale, ought to replant at her own expense.

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(1) (1918) 87 L. J. (Ch.) 577.

(2) [1891] 3 Ch. 306, 351.

(3) [1891] 3 Ch. 360.

[SIMONDS J. In no case has it been held that a tenant for life who has felled trees which are ripe for cutting but are not timber trees is not entitled to the whole of the proceeds.]

It is submitted that here the tenant for life is not acting in due course of management. If the trustees were in possession they would have to replant these larch woods in order to preserve the inheritance. The analogy here is not with an open but with a closed mine.

It is contended by the tenant for life that *In re Harrison's Trusts* (1) was an exceptional case, because there the trees sold had all been blown down by a severe storm. But if the tenant for life is not entitled to the entire proceeds of a mere windfall, even though caused by an "act of God," a fortiori he cannot claim the entire proceeds of his own felling.

The evidence shows that the intention of the testator was that the plantations should be continually replanted as the trees were felled, and there was similar evidence in *In re Harrison's Trusts.* (1) At any rate the ground should not be left in its present condition with the stumps remaining in it; as such it is of no value at all. The tenant for life is not entitled to retain the proceeds of the felling of an entire plantation even though it may have been ripe for felling.

SIMONDS J. The testator, Joseph Simpson Harker, made his will on December 19, 1913, and thereby devised and bequeathed certain freehold and customary lands, tenements, stints or cattlegates and hereditaments situated in various townships and parishes in the counties of Cumberland and Westmorland, together with his flock or flocks of heaf-going sheep on the same estates, to his trustees on trust, during the life of his daughter, Mary Harker, to cultivate and manage them according to the custom of the district with full discretionary powers of cutting timber and underwood for sale, repairs or otherwise, of repairing and insuring houses, of employing servants, and generally of dealing with the premises and flock or flocks of sheep as though they were the absolute owners thereof, and to pay her the net rents and profits during her life. They were then given power, on the daughter attaining a certain age, to let her into possession of the premises, including the flocks of sheep. The testator made a devise of certain other estates, therein called his "Crosthwaite and Tower estates," with the flock or flocks of heaf-going sheep on those estates, to his trustees on the like trusts and subject to the like powers and provisions in favour of his daughter, Margaret Muriel Harker, by reference to the trusts declared in favour of Mary Harker, which I have read. The testator died on November 16, 1914, and his will was duly proved on May 7, 1915. In due course his daughter Margaret Muriel attained the age of twenty-five years and was in the year 1925 let into possession of the Crosthwaite and Tower estates as tenant for life thereof. She has married and had children who, subject to their attaining the age of twenty-one years or becoming married, will be entitled to vested estates of inheritance in the property. They and other persons entitled contingently in reversion are respondents, together with the tenant for life, to this summons, which is taken out by the trustees of the will.

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(1) 28 Ch. D. 220.

The Crosthwaite and Tower estates comprised certain larch plantations, and the tenant for life, being in possession, on August 22, 1935, entered into an agreement for sale of these larch plantations for the sum of 1407*l*. The purchaser in due course entered on the property and felled and carried away the larches. Because, I suppose, some question appeared to arise who was entitled to the purchase-money, it was paid not to the tenant for life but to the plaintiffs as trustees of the will. The plantations were planted before the testator's death. According to the evidence of one of the plaintiff trustees, Mr. Reed, they were planted some forty-two years ago, and at the time of the agreement of 1935 they were ripe for felling in the ordinary course of management. The same deponent told the Court this: "Larch trees cannot "be treated as a crop; they do not grow again from the stock "like ordinary coppice, and when once cut there is an end "to the trees." He went on to say: "According to the "custom of the district, the young trees are pruned and "thinned for the first 15 years after having been planted, "during which period there is no profit from them. When "they attain the age of 15 years they are regularly thinned "in order to allow the proper growth of the trees not cut. "For about five years the thinnings are of comparatively "little value, but when the trees are about 20 years old the "thinnings are sold for fencing purposes. In another 10 years "the remaining trees begin to mature and become fit to be "used as pit wood for the iron-ore mines. When the trees "have reached the age of from 40 to 50 years they begin to "decay and it then becomes necessary to clean the plantation "and (if so desired) to replant the site, when the same process "as above mentioned is repeated." He then said that the custom of management which he described had been practised in respect of the plantations in question, and he further said: "The average income derived from the "thinnings of the said plantations has been insufficient to "defray the expenses of management since the death of the "testator." He went on to say what I have already stated, that at the date of felling the trees were mature and ripe to be cut.

In these circumstances the question which arises is whether the tenant for life, who has been let into possession and entered into this contract for sale, is entitled to the whole of the proceeds, 1407*l.*, or whether some, and if so what, part of it ought to be treated as capital of the estate. It is to be observed that larch is not timber either at common law or by the custom of Cumberland and Westmorland, in which counties these properties are situated. If larch is not timber, as it is not, then it appears to me to follow that, in the absence of any special provision in the will or other disposition affecting the property, a tenant for life who cuts it in due course of management of the estate is entitled to retain for his own use the whole of the proceeds of sale. There is neither at common law nor in equity any rule which prevents a tenant for life from cutting in due course wood which is not timber (other than trees planted for ornament or shelter of the mansion-house or park) and retaining the whole of the proceeds. The analogy to the case of an open mine, which the tenant for life is entitled to work and to receive the whole proceeds of working, is, I think, a good one. Of course, if a tenant for life improperly cuts wood which is not timber, that is to say, cuts it before it is ripe for felling, then no doubt he is liable to an action in the nature of waste, for he has not done that which is right and proper as between himself and the persons entitled to the inheritance of the estate. Also, I think, this is clear from the authorities which have been cited to me, that if some accident intervenes, that is to say, if there is a great storm by reason of which a plantation is laid low before the time has come for felling, or if, again, by an accident of any kind such as a great war which creates peculiar exigencies in the timber trade, it becomes desirable to cut and sell wood before the time at which it is ordinarily ripe for cutting, then equity will intervene and will decree that some part of the proceeds of the wood thus fortuitously sold should be retained for the benefit of the inheritance. That is a course which was followed in *In re Harrison's Trusts* (1) and *In re Terry* (2), to which I have been referred. In the former case Fry L.J. said that the principle that the Court of equity will intervene to prevent an accident from interfering with the rights of parties should be applied. In the present case it is clear that, having cut the plantation only when it was ripe for cutting, the tenant for life is, in the absence of any special provision in the will, entitled to the whole of the proceeds of sale.

Is there anything in the provisions of the will which compels me to come to a different conclusion ? I think not. Its terms provide that the trustees are to cultivate and manage the estate " according to the custom of the district "with full discretionary powers of cutting timber and under-"wood for sale, repairs or otherwise." I find nothing in that which will deprive the tenant for life, when she has been let into possession, even if she is under the same obligation of cultivating and managing the estate, of the right to receive the whole of the rents and profits derived from the sale of these

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(1) 28 Ch. D. 220.

(2) 87 L. J. (Ch.) 577.

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plantations. I cannot assume that if she does not think fit to replant she will be guilty of any form of waste or mismanagement of the estate. She is, prima facie, entitled, in my view, to receive the profits, and I am not, I think, justified in saying that any part of those profits ought to be retained or taken from her because it might possibly be said—I know not with what justice—that she ought to replant the property with a similar plantation. I should be assuming if I did that that she was guilty of something in the nature of waste if she failed to replant. I am not entitled, I think, to make any such assumption. In my view, she is entitled to receive the whole of the proceeds of that which she was entitled to sell, and I cannot hold that she was under any corresponding obligation to replant, so as to justify me in applying some equity and saying that a part of the proceeds of sale ought to be taken from her.

In these circumstances I shall declare, in answer to the question which the summons asks, that the whole of the sum of 1407*l.* ought to be paid to the defendant, Margaret Muriel Bayliss, as the tenant for life under the will.

Solicitors: *Beachcroft, Wakeford May & Co., for Little & Co., Penrith.*

H. L. L.

In re ROAD AND RAIL TRAFFIC ACT, 1933.

WOODWARD *v.* THE LICENSING AUTHORITY FOR THE NORTH-WESTERN TRAFFIC AREA.

FARWELL J.

1937 Dec. 3.

[1937. W. 2990.]

Licence—Motor lorry—" A " licence—Sale of business with lorry—Application by purchaser for licence to expire on same date as expiration of old licence—Publication of application and holding of inquiry in discretion of Licensing Authority—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 1, *sub-ss.* 1, 2, 3 ; *s.* 2, *sub-ss.* 1, 2, 3, 4 ; *s.* 4, *sub-s.* 1 ; *s.* 5 ; *s.* 6, *sub-ss.* 1 (*a*), 2 (*a*), (*b*), (*c*), (*d*) ; *s.* 7 ; *s.* 11, *sub-ss.* 1, 2, 3, 4, 5 ; *s.* 13.

Sect. 11, sub-s. 3, of the Road and Rail Traffic Act, 1933, provides : " This section shall apply to every application for the "grant for the currency period of an A licence . . . . not being " (*b*) an application for a licence to expire not later than an existing "licence under which the vehicles to which the application relates "are authorised to be used for the purposes of a business which "the applicant has acquired or intends to acquire."

F. T. carried on business as a haulage contractor and was the holder of an " A " licence under the Road and Rail Traffic Act, 1933, granted by the respondent, the Licensing Authority, which authorized him to use a vehicle for a period ending April 30, 1938. F. T. died on March 9, 1937, and subsequently his widow, acting as his legal personal representative, made an application to the respondent for an " A " licence, which was granted to her under the Act and which authorized her to use the same vehicle for the duration of the unexpired portion of the term. By a letter, dated April 16, and written on behalf of the applicants, trading as R. & D. Transport, the respondent was informed that the widow of F. T. was negotiating with the applicants for the sale of the business and that when her application had been granted an application would be made by them under s. 11, sub-s. 3 (*b*), of the 1933 Act. On May 24 the applicants duly filed with the respondent an application for a licence to expire not later than April 30, 1938. From time to time the applicants supplied the respondent with all the information he required and was entitled to receive under the Act. By letter, dated August 9, the respondent informed the applicants that he was of opinion that the application was one to which the provisions of s. 11, sub-s. 3 (*b*), could be taken to apply, but that in order properly to exercise his discretion under s. 6 it would be necessary to publish the application in Part I. of "Applications and Decisions" and to consider the application at a public inquiry. The applicants contended that the respondent

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had no power to publish the application or to hold an inquiry and they issued this summons raising the question:—

Held, that the Licensing Authority had power to publish the application and to hold an inquiry, if in his discretion he considered it was necessary to do so, before granting the licence.

ADJOURNED SUMMONS.

The applicants, who were husband and wife, traded as R. & D. Transport and carried on business as haulage contractors at Radcliffe, Lancashire. On or before March 9, 1937, one Frank Thornley carried on business as a haulage contractor and was the holder of an " A " licence under the Road and Rail Traffic Act, 1933, numbered 33993 and granted by the respondent, the chairman of the Traffic Commissioners for the North-Western Traffic Area, as the Licensing Authority under s. 4 of the Act of 1933, which authorized Frank Thornley to use a vehicle registered number R.N. 7935 for a period ending April 30, 1938. Thornley died on March 9, 1937. Subsequently his widow, acting as his legal personal representative, made an application to the respondent for an " A " licence, which was granted to her under the Act and which authorized her to use the same vehicle for the duration of the unexpired portion of the term. By a letter, dated April 16, 1937, from the Commercial Motor Users' Association, written on behalf of the applicants, the respondent was informed that Mrs. Thornley was negotiating with the applicants for the sale of the business and that, when her application had been granted, an application would be made by them under s. 11, sub-s. 3 (*b*), of the 1933 Act. On May 24, 1937, an application for a licence to expire not later than April 30, 1938, was filed with the respondent and there was forwarded to him a preliminary agreement between Mrs. Thornley and the applicants, with particulars of the turnover of the business while it was carried on by Thornley and other matters connected with the business. On June 3 an assignment, dated June 1, between Mrs. Thornley and the applicants was sent to the respondent together with further particulars as to the number of the vendor's customers who would employ the applicants. On June 24 the Commercial Motor Users' Association, writing on behalf of the applicants in reply to a letter dated June 23, sent to the respondent a full list of the vendor's customers and information that the vehicle then authorized to be used by the applicants, trading as R. & D. Transport, was fully occupied and could not take any further traffic. On June 29 there was forwarded to the respondent the list of money earned by R. & D. Transport on their own vehicle. By a letter, dated July 10, 1937, the respondent stated that the application could not be dealt with under the terms of s. 11, sub-s. 3 (*b*), of the Act of 1933, and asked whether, in those circumstances, the applicants wished to withdraw the application or desired that it should be published in an official publication known as " Applications and Decisions " as a new application. By a letter, dated July 30, the applicants' solicitors wrote to the respondent and asked what further information was required. On August 9 the respondent replied that he was of opinion that the application was one to which the provisions of s. 11, sub-s. 3 (*b*), could be taken to apply, but that in order properly to exercise his discretion under s. 6 it would be necessary to publish the application in Part I. of " Applications and Decisions " and subsequently to consider the application at a public inquiry. The applicants then took out this summons, asking whether: (1.) it was necessary or alternatively lawful for the respondent to publish the application as he proposed to do; (2.) whether the respondent was entitled to hold an inquiry into the application or to consider it at a public inquiry. The applicants also claimed a declaration that the application being one to which the provisions of s. 11, sub-s. 3 (*b*), applied, the respondent was not entitled to publish notices or to hold an inquiry as proposed.

Gerald Thesiger for applicants. In this case the Licensing Authority could only grant or refuse to grant the application. He had no power to publish it or to hold an inquiry before he granted or refused the application. This was an application within the terms of s. 11, sub-s. 3 (*b*), of the Road and Rail Traffic Act, 1933, and therefore the rest of the section does not apply. This is an application for a public carrier's or A licence as defined in s. 2, sub-s. 1 (*a*), and sub-s. 2. By s. 3 such a licence is granted for a period of two years. Under s. 6, sub-s. 1 (*a*), the Licensing Authority has full power in his discretion either to grant or to refuse the application. Sect. 11 is the vital section. The section does not apply to any application that comes within sub-s. 3 (*a*), (*b*) or (*c*), and, as this application comes within (*b*), sub-ss. 1 and 5 do not apply. The Act draws a distinction between an application for a licence authorizing the use of a vehicle for the full currency period and an application by a purchaser to use a vehicle for the remainder of a period for which the seller is already licensed to use it. The respondent seeks to ignore that distinction. There is nothing in the Act which gives power to the Licensing Authority to publish the application and to hold an inquiry in a case like this. [He cited *Ex-Army Transport, Ld.* v. *L. H. Diamond & Co., Ld.* (1), where the principles laid down in *Board of Education* v. *Rice* (2) and *Local Government Board* v. *Arlidge* (3) were followed.]

Valentine Holmes for respondent. When persons in the position of the applicants apply for a licence, the Licensing Authority has to take into consideration the matters referred to in sub-s. 2 of s. 11 and if, in his discretion, he thinks it necessary to publish the application and to hold an inquiry he has power to do so. Sub-s. 5 applies as much to this application as to an original application. Under s. 6 he has full power to exercise his discretion judicially.

Thesiger in reply. The respondent, in his letter of August 9, has stated that the provisions of s. 11, sub-s. 3 (*b*), applied and therefore he has no power to exercise his discretion in the manner he claims.

FARWELL J. The applicants contend that on the true construction of the Road and Rail Traffic Act, 1933, the Licensing Authority has no power to do that which he is proposing to do, namely, to publish the application in "Applications and

(1) (1936) 24 Ry. & Can. Tr. Cas. 303.

(2) [1911] A. C. 179.

(3) [1915] A. C. 120.

Decisions" and to hold a public inquiry. Their contention is that this application being in effect for the transfer of a licence for a particular vehicle which they, the applicants, are purchasing to be used for the purposes of the business of the vendor, which they are acquiring, and, having an unexpired term, they are entitled to an "A" licence for the remainder of the period which has still to run for that particular vehicle, and although they admit that the Licensing Authority may grant or refuse the application, they contend that on the true construction of the Act the Licensing Authority has no power to advertise the application, which may have the result of inviting opposition, or to hold an inquiry before deciding whether or not he will grant the application. Whether that be the true view or not depends on the construction of the Act. It is not for me to say whether in this particular case the Licensing Authority ought or ought not to refuse to grant the licence. I am only concerned to see whether under the terms of the Act the Licensing Authority will go outside his powers if he does what he is proposing to do—namely, publish the application and hold an inquiry before either granting or refusing the application.

In order to solve that question it is necessary to look at the terms of the Act of 1933. The Act is entitled "An Act "to make provision for regulating the carriage of goods on "roads by motor vehicles and for controlling the use of vehicles "on certain roads; to amend certain provisions of the Road "Traffic Act, 1930; to amend the law relating to railways "and to make provision for constituting a council to advise "on questions in connection with the means of, and facilities "for, transport ...." Part I. of the Act deals with Road Traffic in connection with Goods Vehicles. Sect. 1 provides: "(1.) Subject to the provisions of this Part of this Act, no person "shall use a goods vehicle on a road for the carriage of goods "—(*a*) for hire or reward; or (*b*) for or in connection with "any trade or business carried on by him, except under a "licence." Then by sub-s. 2 a goods vehicle is defined and in sub-s. 3 there is a provision made for a vehicle which is subject to a hire-purchase agreement. It is not necessary

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to go further in this part of the Act beyond saying there are three classes of licence which are provided for by s. 2—namely, public carriers' licences, limited carriers' licences and private carriers' licences. In this case the licence which I am considering is an " A " licence, that is a public carrier's licence which entitles the holder "to use the authorized vehicles for "the carriage of goods for hire or reward, or for the carriage "of goods for or in connection with his business as a carrier "of goods, whether by road transport or any other kind of "transport." It is not necessary to refer in detail to the other licences ; it is enough to say that a " B " licence permits the holder to carry goods in connection with any trade or business carried on by him or *for hire or reward*, and a " C " licence is a licence to carry the holder's own goods only, so that those businesses which deliver their goods in various parts of the country must have a " C " licence before they can lawfully send their vehicles out on the roads to deliver their goods. Sect. 3 provides for the duration of the licences which in the case of an " A " licence is to be for two years. Sect. 4 provides the constitution of the Licensing Authority. I need not refer to that. By Sect. 5 the procedure on application for licences is prescribed and the applicant has to submit a statement in the prescribed form containing certain particulars. Then s. 6 is a little important for this purpose. That is a section which gives the Licensing Authority discretion as to the granting or refusal of licences. It provides : "(1.) Subject to the provisions of the next succeeding "section, the licensing authority—(*a*) on an application "for an A licence or for a B licence, shall have full "power in his discretion either to grant or to refuse the "application, or to grant a licence in respect of motor vehicles "other than those of which particulars were contained in the "application, or in respect of motor vehicles or trailers less "in number than, or differing in type from, those for the use "of which authorisation was applied for." Then sub-s. 2 provides : " The licensing authority in exercising his discretion shall have regard primarily to the interests of the "public generally, including those of persons requiring, as "well as those of persons providing, facilities for transport, "and, in particular, shall have regard in the case of an application for an A licence or for a B licence—(*a*) where "the applicant is the holder of an existing licence of the same "class, to the extent to which he is authorised to use goods "vehicles thereunder for the carriage of goods for hire or reward; "(*b*) to the previous conduct of the applicant in the capacity of "a carrier of goods; (*c*) to the number and type of vehicles "proposed to be used under the licence; (*d*) in determining "the number of vehicles to be authorised, to the need for "providing for occasions when vehicles are withdrawn from "service for overhaul or repair." I need not refer to that further. Sect. 7 provides special provisions as to certain applications and then I come to the section which really gives rise to the question here, which is s. 11. That section is in these terms: "(1.) The licensing authority shall publish "in the prescribed manner notice of an application to which "this section applies specifying the time within which, and "the manner in which, objections may be made to the grant "of the application." Sub-s. 2 provides: "It shall be the "duty of the licensing authority, on an application to which "this section applies, to take into consideration any objections to the application which may be made by persons who "are already providing facilities, whether by means of road "transport or any other kind of transport, for the carriage of "goods for hire or reward in the district, or between the places, "which the applicant intends to serve, on the ground that "suitable transport facilities in that district, or between "those places, are or, if the application were granted, would "be, either generally or in respect of any particular type of "vehicles, in excess of requirements, or on the ground that "any of the conditions of a licence held by the applicant has "not been complied with. Provided that on an application "for the grant or variation of an A licence, the licensing "authority shall not be bound to take into consideration "objections made by a person who holds a B licence and does "not also hold an A licence." Then sub-s. 3 provides: "this "section shall apply to every application for the grant for the "currency period of an A licence or of a B licence, or for "the variation of such a licence by a direction that additional "vehicles shall be specified therein or that the maximum "number of motor vehicles or of trailers specified in the "licence in pursuance of paragraphs (*b*) and (*c*) respectively of "sub-section (6) of section two of this Act shall be increased, "or, in the case of a B licence, that the district specified in "the licence within which, or the places so specified between "which, the vehicles can be used for the carriage of goods for "hire or reward shall be varied or extended"—then follow these words—"not being—(*a*) an application which the licensing "authority is bound to grant ; or (*b*) on application for a licence "to expire not later than an existing licence under which the "vehicles to which the application relates are authorised to be "used for the purposes of a business which the applicant "has acquired or intends to acquire ; or (*c*) an application as "respects which the licensing authority is of opinion that, "having regard to its trivial character it is not necessary "that any opportunity should be given for objection." Sub-s. 4 provides : "This section shall apply to every application under sub-section (3) of section three of this Act for a "short-term A licence or short-term B licence, unless the "licensing authority is of opinion either—(*a*) that, having "regard to the trivial nature of the application, it is not "necessary that any opportunity should be given for objection ; or (*b*) that the application has been made with "reasonable expedition and that the demand for the use "of the vehicles to be authorised under the licence is so urgent "as to render compliance with the requirements of this "section impracticable." Sub-s. 5 provides : "The licensing "authority may hold such inquiries as he thinks necessary for "the proper exercise of his functions under this Act."

It is unnecessary to refer to anything further in the Act except s. 13, which provides for revoking or suspending licences. There is nothing in the Act which in terms provides for the transfer of a licence from one person to another as there is, for instance, in the licensing laws for the sale of liquor, and what is said here is this : This is an application for a licence to expire not later than the existing licence for the use of a vehicle for the purpose of the business which the applicants have acquired or intend to acquire, and that being so, this is not an application to which s. 11 applies, and that although the Licensing Authority may refuse or grant the application the Licensing Authority has no power to do more than that, and cannot either publish the application or hold an inquiry, but must either refuse or accede to the application without more. The question is, is that the right view of the Act? The only power to hold an inquiry so far as I am aware expressly given by this Act is contained in sub-s. 5 of s. 11, but it is to be noticed the terms of that sub-section provide that "The "licensing authority may hold such inquiries as he thinks "necessary for the proper exercise of his functions under this Act." When an application such as this is made the Licensing Authority has to be satisfied of various matters including those to which I have already referred in s. 6. He also has to satisfy himself that the application is one which is not within s. 11, because it comes within the exceptions which are to be found in sub-s. 3 (*b*). In order to avoid s. 11 in a case of this kind the Licensing Authority must be satisfied that the application is one which relates to a vehicle to be used for the purpose of a business which the applicants have acquired or intend to acquire. That presupposes that the person from whom the vehicle or vehicles have been acquired was at the time of acquisition carrying on a business and it is therefore necessary in my judgment for the Licensing Authority to be satisfied not only that the vendor of the vehicle had a business at the time when he made the application for the A licence, but also that he had not ceased to carry on that business before the sale of the vehicles and, unless he can be so satisfied, the application is not within the exceptions contained in s. 11, sub-s. 3 (*b*). Under these circumstances, if the Licensing Authority considers it necessary to hold an inquiry to satisfy himself of the facts, he is in my judgment entitled to do so, because the inquiry would be necessary for the proper execution of his functions under the Act. If an inquiry is to be held, it is necessary and proper that the application should be

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published in order that any persons who desire to be heard on it should have notice of it, and also to give the applicant an opportunity of hearing any opposition there may be and, so far as he can, meeting it. Under these circumstances in my judgment the Licensing Authority has power to hold an inquiry in a case of this kind if he thinks it necessary to do so. I am not saying that the Licensing Authority is bound to hold an inquiry; it is a matter in the discretion of the Licensing Authority; but if the Licensing Authority, having regard to the facts in each case, thinks it right to hold an inquiry, then, in my judgment, not only is there nothing in the Act which in any way prohibits such an inquiry, but there is, in my judgment, in sub-s. 5 of s. 11 express authority to the Licensing Authority to hold it. For these reasons I am unable to accept the contention of the applicants that there is no power in the Licensing Authority either to publish the application or to hold the inquiry, if he thinks fit so to do.

I am glad to find that I have come to the same conclusion in this matter as that which was come to by the Road and Rail Traffic Appeal Tribunal in *Ex-Army Transport, Ld.* v. *L. H. Diamond & Co., Ld.* (1) That decision of course is not in any sense binding upon me, but it is satisfactory to find that the conclusion to which I have come is in accordance with the conclusion to which that Tribunal came. Accordingly, in my judgment, all I can do on this summons is to dismiss it with costs.

Solicitors for applicants: *Joynson-Hicks & Co., for Henry Backhouse & Son, Blackburn.*

Solicitor for respondent: *The Treasury Solicitor.*

(1) 24 Ry. & Can. Tr. Cas. 303.

P. J. B.

ed. *In re* EVANS' WILL
[1948] 1 Ch. 217

In re GODWIN.

COUTTS AND COMPANY *v.* GODWIN.

[1937. G. 2175.]

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Jan. 13.

Trust—Will—Bank made executor and trustee—Direction to set aside sums sufficient to provide specified annuities—Income and withdrawal fees—Incidence as between annuities and residue.

A testator, having by his will appointed a bank to be his executors and trustees, declaring that they should be entitled to remuneration in accordance with their scale of fees, directed (*a*) that they should " set aside . . . . a sum sufficient to produce " an annuity of 100*l*., which they were to " pay out of the income " thereof " to A. F. G. for life, and that after her death the sum set aside should fall into his residuary estate; (*b*) that they should " set aside . . . . a sum sufficient . . . . to produce after " deduction of income tax . . . . the clear yearly sum of 500*l*. " upon trust to pay such sum " to M. C. P. during her life and after her death to stand possessed of the investments representing the sum set aside in trust for such of her children as being male should attain the age of twenty-one years, or being female should attain that age or marry, and that if no child attained a vested interest, the fund should sink into his residuary estate; (*c*) that they should set apart so much of his residuary estate " as by " means of the income thereof will . . . . produce the clear " annual sum of 100*l*. and . . . . pay the income thereof " to M. G. during her life, and that subject thereto the fund should sink into his residuary estate. The bank charged (i.) an income fee of 2 per cent. on the actual income received, reducible to 1 per cent. if the beneficiary kept his banking account with them, and (ii.) a withdrawal fee on the withdrawal of any property from the estate:—

Held, (1.) that the withdrawal fees in respect of the funds producing the annuities of A. F. G. and M. G. and also the fund producing that of M. C. P., in the event of her leaving no child who attained a vested interest, should be borne by the residuary estate into which they fell.

(2.) that if M. C. P. left a child or children who attained a vested interest, the withdrawal fee in respect of the fund producing her annuity should be borne by that child or those children, since the fund could then never return to the residuary estate.

(3.) that the respective income fees payable on all the annuities should be borne by the income of the funds set aside to produce those annuities.

(4.) that the sums so set aside should be sufficient to produce the amount payable in respect of the income fees at the rate of 2 per cent. in addition to the full amount of the annuities named.

Reported by F. H. Cowper, Barrister-at-Law.

(5.) that the full amount of the fund so set aside to produce the annuity of M. C. P. and the income fees in respect thereof should after her death be held in trust for her child or children who attained a vested interest under the will.

ADJOURNED SUMMONS.

By his will dated January 24, 1934, the testator, John Godwin, who died on September 25, 1935, appointed the plaintiffs, Coutts & Co., bankers, to be executors and trustees thereof, declaring that they should be entitled to remuneration in accordance with the appropriate scale of fees published by them.

Clause 5 of the will provided: "I direct my trustees to set "aside out of my estate a sum sufficient at any time of so "setting aside to produce the annuity next hereinafter "mentioned, and to stand possessed thereof upon trust to "pay out of the income thereof the sum of 100*l.* a year to "Alice Frances Godwin, widow of my deceased brother, "Joshua Godwin, during her life commencing from my death, "to be payable by equal monthly payments in advance, the "first thereof to be made as soon as possible after my death, "and after her death the sum so set aside as aforesaid and "the investments representing the same and the income thereof "shall fall into my residuary estate."

Clause 7 provided: "I direct my trustees to set aside "out of my estate a sum sufficient at the time of such setting "aside to produce after deduction of income tax at the rate "current at the date of my death the clear yearly sum of "500*l.* upon trust to pay such sum to my niece Mabel Clarence "Price during her life, and from and after the death of "my said niece I direct that my trustees shall stand possessed "of the investments representing the sum so set aside under "this clause to produce the annual sum of 500*l.* in trust for all "or any of the children or child of my said niece who being "male shall attain the age of twenty-one years, or being female "shall attain that age or marry, and if more than one, in equal "shares, and if my said niece shall not have a child who attains "a vested interest in the said fund, then I direct that the same "shall sink into and form part of my residuary estate."

Clause 11 (i.) provided: "My trustees shall as soon as "conveniently may be after my decease set apart and invest "in the names of my trustees in accordance with the provisions "relating to investments contained in this my will so much "of my residuary estate as by means of the income thereof "will at the time of its being so set apart and invested produce "the clear annual sum of 100*l.* and shall stand possessed of "the funds so set apart and invested upon trust to pay the "income thereof when and as the same shall from time to "time be received to my sister-in-law, Maude Godwin, during "her life and subject to the trust aforesaid I direct that the "same funds shall sink into and form part of my residuary "estate."

According to the scale of fees published by Coutts & Co., the plaintiffs: "A fee on the actual income received . . . . "is payable out of such income at the rate of 2*l.* per cent. "Where, however, the only duty on the bank will be to recover "such income and by arrangement pay it to the banking "account of the person entitled thereto, this fee will be "reduced to 1*l.* per cent. if the person entitled to the income "keeps his banking account with the bank." The scale of fees also provided that on withdrawal from the estate of any property forming part thereof, the plaintiffs were entitled to be paid a withdrawal fee on the gross value at the date of the withdrawal of the property so withdrawn.

This summons was taken out by the plaintiffs to determine (*a*) whether the income fees should be paid out of the income of the residuary estate, and (*b*) whether the withdrawal fees should be paid out of the capital of the respective funds or out of the capital of the residuary estate.

A. F. M. Berkeley for the plaintiffs.

David Jenkins for the annuitants. The words of each of the relevant clauses indicate that the annual sums are to be received by the annuitants undiminished by the income fees payable to the bank. These fees, which form part of the administration expenses, must, therefore, be met at the expense of the residuary estate: *In re Sir Edward Hulton, Bt.*

(*Deceased*) (1); *In re Riddell.* (2) The funds set aside must be sufficient to produce the named amounts of the respective annuities and, in addition, the appropriate income fees. No express provision in the will is necessary to enable this to be done, since if it were not done the annuitants would be getting less than the testator directed. The fact that the children of Mabel Clarence Price will be entitled to a greater sum than would, apart from the payment of the income fee, be necessary to produce the annuity named is the result of the testator's direction and must be taken to have been his intention. In calculating the sum to be set aside to meet the income fee, this should be reckoned at 2 per cent. The fact that in some circumstances it may be diminished to 1 per cent. is not material. Inasmuch as these funds will or may sink back into residue after the expiration of the respective life interests, the withdrawal fees should be borne by the residue.

R. L. Edwards for the persons interested in the residue. Both the income fees and the withdrawal fees are payable out of the respective funds: *In re Roberts' Will Trusts.* (3) These funds have been taken out of the residuary estate and set apart from it to be held on certain trusts so that it cannot be required to bear expenses connected with them. The test is the setting aside. Very clear words in a will would be necessary to permit expenses of this kind to be borne by the residuary estate. The reference in clause 7 of the will to a "clear yearly "sum" is complementary to the express direction that the sum should be 500*l.* after deduction of income tax, and has nothing to do with the payment of the income fee. In the absence of any express direction, the income fees should be met out of the annuities. As in the case of income tax deducted at source the recipient is deemed to have received the full amount of the income, so these annuitants would be deemed to have received the full amounts named. Further, the income fees are not payable till the income has been received, and accordingly provision cannot be made for it in advance. If sums are set aside to meet the income fees as well as the annuities, then in the case of Mabel Clarence Price her children would eventually receive at the expense of the residue a capital sum greater than that needed to produce the amount of the annual sum named. Should it be held that a sum must be set aside to meet the income fees, they should be reckoned at 1 per cent. and not 2 per cent.

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(1) [1936] Ch. 536.

(2) [1936] Ch. 747.

(3) [1937] Ch. 274.

David Jenkins in reply.

FARWELL J. [having stated the facts:] The questions which I am asked to determine relate to the source from which the income fees and the withdrawal fees payable in respect of these three sums are to be drawn. So far as the withdrawal fees payable in respect of the funds producing the annual sums given to Alice Frances Godwin and to Maude Godwin are concerned the matter is not of substantial importance. After their interests cease the funds fall into and form part of the residue. The residue, therefore, will have to bear the withdrawal fee and it is not a matter that I need consider further. The only case of the three in which this question may become important is that of the sum set aside to produce 500*l.* a year for Mabel Clarence Price, because, if that lady has a child or children who attain a vested interest in that fund, it will become the property of that child or those children and will not form part of the residue. On the other hand, if the lady has no child who attains a vested interest, then the question is not one which need be considered further, because the sum set aside will fall into residue and residue will have to bear the withdrawal fee. In the event of there being children, however, the matter is one of some little importance. In the case of the withdrawal fee, if on the death of Mabel Clarence Price there are children of hers who take so that the fund never goes back to the estate at all, I cannot myself feel any doubt that the withdrawal fee must be paid by those persons who benefit by the gift under the will, that is to say, by the child or children of the lady who ultimately become entitled to this fund. Once this sum is set aside to produce the 500*l.* a year for the lady and once there are children of hers who take a vested interest then that fund ceases altogether to be part of

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the estate of the testator; it is segregated from that estate, forming a separate trust fund, and, in my judgment, so far as the withdrawal fee is concerned, the beneficiaries under that trust have no right to call upon residue to find the necessary money. Therefore, so far as that is concerned, in my judgment, the withdrawal fee, in the event of there being children of Mabel Clarence Price who take the fund, must be paid out of the fund itself and not out of residue.

The question of difficulty arises with regard to the income fee, the position being as follows: It has been determined by two cases, one a decision of Clauson J. in *In re Sir Edward Hulton, Bt. (Deceased)* (1), and one a decision of my own in *In re Riddell* (2), that where a testator appoints an executor and gives that executor the right to charge fees for his services including an income fee and gives annual sums to be paid out of the income of the residue, in such a case the income fee has to be paid out of residue and not out of the annual sums payable to the annuitant. I think the reason for that is quite plain. Persons who are residuary legatees are entitled to nothing until the annuitants have received their annuities, and part of the administration expense necessary to enable the annuities to be paid is the income fee; the income fee is something which the estate has to bear and which cannot be thrown upon the persons who are entitled to yearly sums payable in priority to residue. But as Crossman J. has pointed out in the case of *In re Roberts' Will Trusts* (3), the difference between a gift of an ordinary annuity and a direction in a will to set aside a particular named sum and to hold that sum on trust for A. with remainder to B. is perfectly plain. In the latter case, the trustees' duty is to take the sum which is named in the will, to segregate it, as it were, from the estate of the testator, and to invest it and hold it as a separate trust fund. The income and the capital must be applied in accordance with the trusts declared by the will of that fund, and the moment the sum specified is taken out of the estate and becomes a trust fund for the benefit of the beneficiaries of that fund any expenses incurred in administering it must be borne by the income or the capital, as the case may be, of that fund, and there can be no ground for calling upon the residuary legatees to pay either income or capital charges, because the fund has ceased to be any part of the estate of the testator and in no circumstances can it fall into residue or return to the testator's estate.

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(1) [1936] Ch. 536.
(2) [1936] Ch. 747.
(3) [1937] Ch. 274.

In this particular case, however, I have not, on the one hand, the simple case of the gift of an annuity payable out of residue, nor, on the other hand, have I the case of a definite sum which is to be set aside to create a separate trust fund. This case really falls between the two. I must, therefore, decide it on principle, and I do not think that any of the decisions to which I have referred can assist me, except in so far as they lay down the general principle. In this case there is no direction to set aside a stated sum of money. It is not a case where the testator has said: "Take 5000*l.* "out of my property and invest it and hold it upon trust "for A. for life with remainder to A.'s children," defining quite plainly what is the amount to be taken and directing a segregation of that sum from the general residuary estate. In the case of Alice Frances Godwin what the trustees are directed to do is to set aside out of the estate a sum sufficient to pay 100*l.* a year to her, and on her death that sum is to form part of residue; so that the fund which is to be provided to produce this annuity is not a fund which is in any sense taken out of the testator's estate and segregated from the rest to form a separate trust fund; it is a fund which the trustees have to provide out of the estate and which has, from its income, to produce an annuity for the lady, but which, on the determination of the annuity, remains in their hands as part of the residuary estate. In those circumstances, in my view, once the fund which is sufficient to produce the annuity has been set aside, there is nothing to prevent the remainder of the residuary estate being distributed, if it is distributable, under the will. In other words, in my judgment, the income of the fund set aside is the income which must be looked to for payment of the income fee.

But that does not by any means decide this matter, because it remains to be considered what sum ought to be set aside to produce the income. Is it sufficient if a sum producing 100*l.* a year and no more is set aside, which will mean that the annuitant will not get 100*l.* a year, but only 100*l.* a year less the income fee charged by the trustees, or is it the trustees' duty to set aside a sum sufficient to provide not only the annuity but the income fee as well so that the lady will get, in fact, the 100*l.* a year which the testator has given her? In my judgment, this is not a case like that of a particular named sum directed to be set aside, as in *In re Roberts' Will Trusts.* (1) It is the duty of the trustees to determine what sum is required to produce 100*l.* a year. for the annuitant, and they will not be performing that duty fully if they set aside a sum which is sufficient only to give the annuitant 100*l.* a year less the amount of the income fee. The income fee is an administration expense in one sense of the term, and, if the sum set aside does not produce enough to pay it and give the lady 100*l.* a year, the trustees are not doing that which the testator has directed. Therefore, in my judgment, at any rate so far as the gifts in clauses 5 and 11 of the will are concerned, the sum set aside must be a sum sufficient to pay the full annuity together with a sum sufficient to produce the income necessary to pay the income fee. The income fee must be taken as being 2 per cent. in accordance with the terms of the bank's charges. The mere fact that some relief may be given because a beneficiary chooses to keep her account at that bank is not a matter to be considered in determining the amount to be set aside. Once a sum sufficient to produce the 100*l.* a year and the income fee has been set aside then there is nothing whatever to prevent the residue being distributed, assuming that it is distributable, amongst other persons, because once that is done the income from the sum set aside will be available for payment of the income fee in addition to the annuity. It has to be borne in mind that the income fee payable in a case of this sort differs completely from income tax or super-tax. The unfortunate person who has his income tax deducted at the source and only gets a small portion of the nominal sum due to him is, none the less, deemed to have received the whole of it, and the person who pays the income tax is treated as his agent. That has no application in the present case, and in dealing with the question of this income fee, in my judgment it is of no assistance whatever to consider the question of income tax. It has been argued by Mr. Edwards that in order to reach the conclusion which I hold is the right one very clear words must be found in the will. I do not accept the view that express provision in the will is needed. I think that once it is found that the testator has left to his executors the duty to determine the amount which is to be set aside to produce an annuity the sum must be sufficient to give the annuitant the annuity named in the will; and from that it follows that their duty is also to provide a sum the income of which will be sufficient to produce the income fee.

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(1) [1937] Ch. 274.

With regard to the gift in clause 7 there is this difference. In each case of the other two gifts the whole of the fund, including the sum set aside to meet the annuity and the sum set aside to meet the income fee, will fall back and form part of the residuary estate, and, therefore, although the residuary estate will be reduced, as it were, temporarily, in time the whole fund will come back into residue. But in the case of the fund producing the annuity for Mabel Clarence Price, if she has children who attain a vested interest, the sum set aside can never come back into residue but will pass to them; and it is said that they will get an undue advantage, because they will get a capital sum in addition to the sum required to produce 500*l.* a year. I do not think there is really anything in that contention, because if it be correct to read this direction as one to set aside a sum which is to be sufficient to produce 500*l.* a year without any deduction for income fees, then the obligation on the trustees must be to set aside a fund sufficient to pay the 500*l.* a year clear, and

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that will entail the necessity of setting aside a further sum of capital to produce the income fee payable. That will no doubt result in some benefit to the ultimate beneficiaries, but that is a result of the testator's direction and must be taken to be what he contemplated.

In my judgment, the result of it all is this, that the withdrawal fee in the case of Mabel Clarence Price is a matter which does not concern the residuary estate at all, unless the fund ultimately falls into residue. If there are children of the annuitant who take, then they must bear the withdrawal fee. With regard to the income fees, although I agree with Mr. Edwards that it is not a case of holding up the residue to produce a sum to pay the income fee in each of these three cases, nevertheless it is the duty of the trustees to set aside sums which will enable the annuitants to get their annuities without deduction of the income fee, which must involve setting aside a sum sufficient to pay the income fee in addition to the annual sums.

I will make a declaration to that effect.

Solicitors: *Merton Jones, Lewsey & Jefferies.*

F. H. C.

WHITE *v.* BIJOU MANSIONS, LIMITED.

C. A.
1938
Feb. 8, 9.

[1936. W. 1461.]

Covenant — Restrictive covenants — Right to enforce — No regulations common to estate—Plaintiff not a grantee or covenantee named in conveyance containing covenant—Meaning of "assigns"—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 56, *sub-s.* 1.

Applied. STROMDALE & BALL LD. *v.* BURDEN [1952] 1 Ch. 223

On June 12, 1886, the owners of a freehold estate in London entered into a contract to sell it to builders and completion was fixed for June 24, 1890. The builders were given power to let on building lease or sell any part of the estate, any lease or conveyance to contain a covenant to use the land and any buildings erected thereon as and for a private residence only. Part of the property was conveyed in 1886 by the owners and builders to a purchaser F., who covenanted to build a house thereon and to use it only as a private residence, subject to certain stipulations. The builders entered into covenants with F. that every building lease or other assurance of the rest of the estate should contain covenants on the part of the purchaser or lessee with the builders (inter alia) to use the land for the purpose of a private dwelling-house only. The plaintiff derived title under the conveyance to F. and a similar deed executed in 1887.

In 1890 the same vendors conveyed the adjoining land to a purchaser N., who entered into covenants with the owners and the builders and their assigns similar to those contained in the conveyance of 1887, to build a house thereon to be used as a private residence only. This land and the house built upon it became vested in P. in fee, and P. was duly registered at the Land Registry with an absolute title subject to the last mentioned covenant, which was entered upon the charges register. P. granted a lease of the premises for a term of twenty-eight years to lessees, who afterwards assigned it to the defendants. The lease contained a covenant by the lessees not to use the premises for any purpose other than a private dwelling-house or private suites or flats. The plaintiff brought the action to restrain the defendants from committing a breach of the covenant on the register by converting the house into a set of private suites:—

Held, by the Court of Appeal, (1.) that neither the covenant by the builders in the conveyance to F. nor the stipulation in the agreement of June 12, 1886, could be taken to constitute regulations enforceable by purchasers of various parts of the estate inter se; (2.) that as the conveyance to F. preceded that to N., F. was not an assign of the owners within the meaning of the covenant entered into by N. with the owners in the conveyance to him so as to entitle the plaintiff by virtue of s. 56, sub-s. 1, of the Law of Property Act, 1925, to the benefit of the covenant.

Decision of Simonds J. [1937] Ch. 610 affirmed on these points.

APPEAL from a decision of Simonds J. (1)

By an agreement dated June 12, 1886, Colonel Alexander Chorley Davidson and his sister Maria Louisa Davidson, who were the freehold owners of an estate called the Shaftesbury House Estate on the north side of the Bayswater Road, agreed for the sale of the estate to two persons called Daw for the sum of 55,000*l.* Completion was to be on June 24, 1890, but the Daws were to be given possession as soon as the title was accepted and to pull down existing buildings on the estate and make a road which was called Palace Court. They were given power to grant building leases for terms not exceeding ninety-nine years at ground rents of not less than a specified rate per foot frontage or to sell the fee simple of any part of the property at prices not less than twenty-eight-and-a-half years purchase of the minimum ground rents. Any lease or conveyance from the Daws was to contain a covenant to use the ground demised or conveyed and any buildings to be erected thereon as and for a private residence only.

By two conveyances on sale dated December 17, 1886, and May 3, 1887, a part of the estate, now known as No. 16 Palace Court, was conveyed by the Davidsons and the Daws to James Israel Fellows. The deeds contained recitals of the agreement of June 12, 1886, and an agreement for the sale of the property to Mr. Fellows, and Mr. Fellows entered into a covenant with the Daws that he would build a dwelling-house for 4000*l.* and that he would use it as and for a private residence and for no other purpose except for the residence and place of practice of a medical man. The Daws and each of them covenanted with Fellows in these terms : " For themselves their "heirs executors administrators and assigns and each of them for "himself his heirs executors administrators and assigns with "the intent to bind themselves and all other persons in whom "the residue of the land called the Shaftesbury House Estate "comprised in and delineated on the plan annexed to the said "agreement of the 12th day of June, 1886, shall for the time "being be vested but not so as to make themselves personally

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(1) [1937] Ch. 610.

"liable under this covenant in respect of any part or parts "of the same land after they the said covenanting parties "respectively have ceased to be owners or owner thereof do "and doth hereby covenant with the said James Israel "Fellows his heirs and assigns that every building lease or "other assurance of any part or lot of the said Shaftesbury "House Estate (other than the part hereby granted) shall "contain covenants or conditions on the part of the purchaser "lessee or owner of the property," with the Daws regulating the building including a covenant to use the land and all buildings thereon for the purpose of private dwelling-houses only except that a specified part of the estate might be used for shops. The Daws entered into a similar obligation in respect of the land so long as it should remain in their own ownership and to enforce the covenants in any lease or conveyance at the request in writing of Mr. Fellows, his heirs or assigns. The plaintiff was the successor in title of Mr. Fellows.

The defendants, Bijou Mansions, Ld., were lessees of the adjoining property, No. 18 Palace Court. By a conveyance dated May 2, 1890, and made between the Davidsons of the first part, the Daws of the second part and one Nicholson, the purchaser, of the third part, that property was conveyed to Nicholson, the purchaser, subject to a covenant by the purchaser " for himself, his heirs, executors, administrators "and assigns to the intent to bind himself and his successors "in title and the owner for the time being of the property "thereby conveyed" with the Davidsons, " their heirs and "assigns, that the said piece of ground hereby conveyed and "any buildings to be erected thereon shall at all times be used "as and for a private residence only." The purchaser further entered into a covenant in the same form with the Daws to erect a certain building on the land conveyed and to use the premises as a private residence only.

No. 18 Palace Court later came into the ownership of one Irene Plumbly, who was duly registered under the Land Registration Act, 1925, with an absolute title, and the covenant stated above was entered in the charges register. On April 16, 1935, Miss Plumbly granted a lease of No. 18 Palace Court to two ladies for a term of twenty-eight years from March 25, 1935. That lease contained a covenant on the part of the lessees that they would not use or permit to be used the demised premises or any part thereof for any purpose other than a private dwelling or for private suites or flats. That lease was in due course assigned to the defendants, who had used the house for flatlets.

The plaintiff brought this action to restrain the defendant from committing a breach of the covenant on the charges register by using the premises otherwise than for a private residence.

Simonds J. held (1.) that by virtue of s. 50, sub-s. 2, of the Land Registration Act, 1925, the defendants were affected with notice of the covenant entered on the register; (2.) that the plaintiff was not a person entitled to the benefit of the covenant under s. 56, sub-s. 1, of the Law of Property Act, 1925; and (3.) that on the facts the defence of acquiescence by the plaintiff in changes which had taken place in the neighbourhood failed. And he dismissed the action on the second ground.

The plaintiff appealed. The appeal was heard on February 8 and 9, 1938.

A. Grant K.C. and *Roger Turnbull* for the appellant. Having regard to Simonds J.'s decision it is settled that the burden of the covenant entered into by Mr. Nicholson is on the defendants, but the question is whether the plaintiff is entitled to the benefit of it and can enforce it. Simonds J. held that he could not, but this would be to render the rights conferred by the covenant entered into by the Daws with Mr. Fellows nugatory, for they have parted with the whole estate and cannot enforce the covenant entered into with them.

It is a question depending on the facts in each case whether a covenant has been imposed for the benefit of the then owners of the estate only or for the benefit of all subsequent holders of parts of the estate under those owners. Here all purchasers of any part of the Shaftesbury House Estate take the benefit of and are bound by the regulations as to building contained in the covenant by the Daws with Mr. Fellows: compare *In re Birmingham & District Land Co. and Allday* (1). The result of Simonds J.'s judgment would be that no one could enforce them: see *Collins* v. *Castle.* (2) This is a case such as *Nottingham Patent Brick & Tile Co.* v. *Butler* (3), which, as was pointed out in *Rogers* v. *Hosegood* (4) was not a case of a building scheme but was none the less a case where a local law was binding on the occupants of property inter se.

[SIR WILFRID GREENE M.R. The conveyance to Mr. Nicholson contains no corresponding covenant by the Daws. Therefore the covenant contained in Mr. Fellows' conveyance cannot be treated as imposing a local law on the estate. The covenant so far as the evidence goes was special to Mr. Fellows.]

Even so a purchaser of any part of the estate is bound by the obligations undertaken by the Daws in the agreement of June 12, 1886. Both Mr. Fellows and Mr. Nicholson had notice of that agreement and it is contended that every other purchaser of any part of the estate must have had notice of it.

The agreement was a common document of title on a sale to any one of part of the estate and therefore establishes a local law for the estate. The fact that there was power for the Davidsons and Daws together to relax the local law as shown by their permitting shops on a certain part of the estate is in no way fatal to this contention.

The only remaining point is as to the construction of s. 56 of the Law of Property Act, 1925, which enables the successor in title of Mr. Fellows to sue, although not a party to the covenant. It is true that if the appellant fails on the earlier contention it is difficult to see how s. 56 will help matters. But it is contended that the word " assigns " in the covenant by Mr. Nicholson with the Davidsons, " their heirs and " assigns " includes Mr. Fellows as a person for whose benefit the covenant was made. The word " assigns " means assigns of any part of the Shaftesbury House Estate, whether the assignment was made by the Davidsons and the Daws before or after the conveyance to Mr. Nicholson: see *In re Ecclesiastical Commissioners for England's Conveyance.* (1)

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(1) [1893] 1 Ch. 342.

(2) (1887) 36 Ch. D. 243.

(3) (1886) 15 Q. B. D. 261; 16 Q. B. D. 778.

(4) [1900] 2 Ch. 388, 397.

[They also referred to *Nicoll* v. *Fenning* (2) and *Mann* v. *Stephens.* (3)

R. F. Roxburgh K.C. and *W. F. Waite* for the respondents were not called upon.

Sir Wilfrid Greene M.R. The respondents to this appeal are the holders of a lease of premises known as No. 18 Palace Court, Bayswater. That lease was dated April 16, 1935, and was assigned to the respondents by an assignment or pursuant to an agreement dated May 12, 1936. The respondents are entitled, according to the terms of the agreement and the lease itself, to use the premises for private suites or flats. That is what they are doing, or are intending to do, because they have altered, or are intending to alter, the premises so as to make them suitable for use and occupation as what are called "flatlets." The appellant seeks to restrain that user, and seeks to do so because he says the respondents are bound by a restrictive covenant affecting the freeholder from whom their lease was derived, a covenant of which they have notice. Simonds J. held that, although notice, so far as it is necessary, or would have been necessary, is to be imputed to the respondents, the present appellant was not entitled to enforce against the respondents the restrictive covenant in question.

The first and main question in the case is whether or not there is affecting this property a restrictive covenant confining its user to the purposes of a private dwelling-house of which the appellant can take advantage. It is necessary to go a little into the history of the estate upon which the houses stand. There was in the year 1886 an estate on the north side of the Bayswater Road called the Shaftesbury House Estate. It ran back from the Bayswater Road to Moscow Road, and it had a frontage of 305 feet to the Bayswater

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(1) [1936] Ch. 430, 438.
(2) (1881) 19 Ch. D. 250, 265.
(3) (1846) 15 Sim. 377.

Road and 224 feet to Moscow Road. That estate belonged to some people of the name of Davidson; there was a Colonel Davidson and a Miss Davidson, and the Davidsons on June 12, 1886, entered into an agreement with two gentlemen of the name of Daw for the sale to them of the estate. The purchase price was 55,000*l.*, and the purchasers were to pull down the existing buildings and make a road; that road is in fact the road at present known as Palace Court. The scheme for completing the conveyance of the property and its development was of this nature. The purchasers were entitled to grant building leases, or to sell the fee simple of any parts of the property. There were provisions as to the minimum ground rents on the grant of the building lease, the cost of houses and the minimum frontage over which they were to extend. There was a provision that as soon as a house was built the vendors, that is the Davidsons, should grant a lease, and that was to include a covenant to use the premises as and for a private residence only, and that lease might have an option of purchase. There was an alternative provision by which instead of granting a ninety-nine years' lease at a ground rent the vendors were to convey a piece of land in fee simple on receiving a certain number of years' purchase of the ground rent. It provided that such conveyance was to contain a covenant to use the ground conveyed, or any buildings to be erected thereon, as and for a private residence only, or for purposes connected therewith. Completion was to take place on June 24, 1890. I do not think that there are any other provisions in the document to which I need refer. It must be observed in connection with it that in view of the piecemeal provisions for completion, if I may so call them, and the possibility which always exists in cases of this kind that purchasers will not be able to carry out the whole of the purchase by getting rid of all the lots, the provisions with regard to the covenants as to user would be provisions certainly for the benefit of the vendors, because it would enable them, if any part of the property was thrown back on their hands, to ensure the maintenance of the property as a residential estate.

Now the present appellant, the plaintiff in the action, is the successor in title of a Mr. Fellows, and Mr. Fellows seems to have been, if not the first, at any rate one of the earliest purchasers of plots on this estate, because on December 17, 1886, there was conveyed to him on sale for the sum of 6700*l.* the fee simple of a piece of land on which there now stands a house known as No. 16 Palace Court. The conveyance is made between the Davidsons of the first part, the Daws of the second part, and Mr. Fellows of the third part. It recites the agreement, it recites the contract to sell to Mr. Fellows, and it conveys to Mr. Fellows the property in question. It contains a covenant by Mr. Fellows to build and to use the houses erected and all buildings to be erected thereon as and for a private residence and for no other purpose except for the residence and place of practice of a medical man subject to stipulations, and the Daws enter into an elaborate covenant. The covenant into which they enter is a covenant expressed to be binding on them and all persons taking the residue of the estate that every building lease or other assurance of the estate shall contain certain covenants by the purchasers or lessees. The covenants which were to be contained in those documents were to be covenants with the Daws, their heirs or assigns, and they were to be covenants regulating the building on the plots in specified manners under several heads, including the covenant to use the land comprised in any such lease or conveyance and all buildings thereon save as aforesaid (the meaning of which I will explain in a moment) as and for private dwelling-houses only and for no other purpose whatsoever. The Daws therefore are agreeing with Mr. Fellows that, when they come to sell other plots on the estate, they will procure the purchasers to enter into a covenant with themselves, the Daws, to observe this series of six stipulations; there are six in all. The stipulation with regard to user is not an absolute stipulation confining the user to that of a private dwelling-house, but contains modifications (to which the words "save as aforesaid" refer), and one of the modifications is that shops may be erected on the Moscow Road frontage, and I think one other place, but it does not matter. The important thing to notice is that the restrictive covenant which the Daws undertake to take from future purchasers is not identical with the restrictive covenant in the original agreement which I have read, in which there was no power to erect shops. Presumably, so far as the Daws were entitled to allow the erection of shops, they could only have obtained that right by a concession from the Davidsons. The document then goes on and contains a covenant by the Daws to the effect that the six stipulations to which I have referred should apply to any houses built by or for the Daws themselves, or any land which, for the time being, should remain unbuilt on. That I may describe as a transitory provision, a provision designed to fill up the gap which might be caused in the event of the Daws building a house or leaving the land unbuilt upon for some time. As soon as they assign or let, the undertaking to obtain from the lessee or purchaser the covenant to which I have referred will, of course, take its place. It is a transitory provision inserted in order to ensure that, so long as land remains in the hands of the Daws, Mr. Fellows should have the same right against the Daws as the Daws would have against the purchasers or lessees under the covenants which the Daws agreed to obtain. The Daws go on to covenant that they will, at the request of Mr. Fellows, his heirs and assigns, "commence and prosecute all "such legal proceedings as shall be necessary or proper for "compelling the observance and performance of clauses 1 to "6 both inclusive by the person or persons for the time being "owners of part or parts of the said Shaftesbury House "Estate not hereby granted and assured." The scheme, therefore, which Mr. Fellows was getting for his protection was that the Daws were to exact from future lessees or purchasers these covenants, and the Daws agreed with Mr. Fellows that at the request of Mr. Fellows they would enforce them. That was the method by which Mr. Fellows was to be protected. Now the house which is in the possession of the respondents was built on land comprised in a conveyance of May 2, 1890, to one Nicholson. That was a conveyance by the Davidsons, and the Daws, who are called the vendors.

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It recites, amongst other things, the original agreement for sale by the Davidsons to the Daws, and it recites the stipulation therein contained that the conveyance should contain a covenant to use the ground conveyed or any buildings to be erected thereon as and for a private residence only or for purposes connected therewith. Then it contains after the grant a covenant by the purchaser, " for himself his heirs "executors administrators and assigns to the intent to bind "himself and his successors in title and the owners for the "time being of the piece of ground and premises hereby "conveyed . . . . with the said parties hereto of the "first part "—those are the Davidsons, not the Daws— "their heirs and assigns that the said piece of ground hereby "conveyed and any buildings to be erected thereon shall at "all times hereafter be used as and for a private residence "only or for purposes connected therewith but so that this "covenant shall not affect the right to use the premises for "the purposes of a medical man in manner and subject as "hereinafter provided." That is the restriction entered into by Mr. Nicholson which the present plaintiff says he is entitled to enforce. Then comes an undertaking by the purchaser with regard to building frontages, cost of buildings and so forth, which I do not think I need read. It contains a covenant that the purchaser " shall use the piece of ground "and all buildings thereon save as aforesaid as and for private "dwelling houses only and for no other purpose whatever." There is no restrictive covenant by the Daws, there is no restrictive covenant by the Davidsons with regard to that portion of the estate which had not, up to that date, been sold. The intervening title I need not go into.

The present plaintiff as an assign of Mr. Fellows seeks to restrain the present respondents, as persons deriving title from Mr. Nicholson, from committing a breach of that covenant. The way in which the case is put by Mr. Grant is this. He says that the case is one of the class of case of which perhaps the most familiar example is to be found in the case of the *Nottingham Patent Brick & Tile Co.* v. *Butler*. (1) In order to indicate the way in which the case is put, I cannot do better than quote two passages from that case, because Mr. Grant says that upon the facts of this case it falls exactly within the language there used. The first passage is from the judgment of Wills J. in the Court of Queen's Bench. What he says is this (1): "Where the same vendor selling to "several persons plots of land, parts of a larger property, "exacts from each of them covenants imposing restrictions "on the use of the plots sold without putting himself under "any corresponding obligation, it is a question of fact whether "the restrictions are merely matters of agreement between "the vendor himself and his vendees, imposed for his own "benefit and protection, or are meant by him and understood "by the buyers to be for the common advantage of the "several purchasers. If the restrictive covenants are simply "for the benefit of the vendor, purchasers of other plots of "land from the vendor cannot claim to take advantage of "them. If they are meant for the common advantage of a "set of purchasers, such purchasers and their assigns may "enforce them inter se for their own benefit." When that case went to the Court of Appeal Lord Esher approved the judgment of Wills J., and himself used a phrase which, I think, brings out another important aspect of this class of case. This is how Lord Esher states the question (2): "the "question, whether it is intended that each of the purchasers "shall be liable in respect of those restrictive covenants to "each of the other purchasers, is a question of fact, to be "determined by the intention of the vendor and of the "purchasers, and that question must be determined upon the "same rules of evidence as every other question of intention." The class of case which is there being dealt with is the case where it is possible and proper to infer, from the facts of the case, an agreement by which all the purchasers agree to be bound inter se, by which is meant, that each purchaser shall have the right to enforce restrictions against each other purchaser. Lord Parker in *Elliston* v. *Reacher* (3) (a building scheme case) pointed out that the implication of a contract will not meet every case, and he preferred to say that the community of interest imported reciprocity of obligation.

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(1) 15 Q. B. D. 261; 16 Q. B. D. 778.

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(1) 15 Q. B. D. 268.
(2) 16 Q. B. D. 784.
(3) [1908] 2 Ch. 374.

However that may be, there are certain matters which must be present before it is possible to say that covenants entered into by a number of persons, not with one another, but with somebody else, are mutually enforceable. The first thing that must be present in my view is this, there must be some common regulations intended to apply to the whole of the estate in development. When I say common regulations, I do not exclude, of course, the possibility that the regulations may differ in different parts of the estate, or that they may be subject to relaxation. The material thing I think is that every purchaser, in order that this principle can apply, must know when he buys what are the regulations to which he is subjecting himself, and what are the regulations to which other purchasers on the estate will be called upon to subject themselves. Unless you have that, it is quite impossible in my judgment to draw the necessary inference, whether you refer to it as an agreement or as a community of interest importing reciprocity of obligation. When the present case is examined, it appears to me that the essential circumstances are entirely lacking. Mr. Grant, if I understood his argument correctly, first of all treated the regulations affecting the estate as being those set out in the conveyance to Mr. Fellows. It must be observed that those regulations cannot possibly be common to the whole estate because there is not a particle of evidence that anybody else was given a covenant of that kind, or that Mr. Nicholson, or any other purchaser, knew that any such covenant had been given. In fact, the provisions in regard to Mr. Fellows really become quite irrelevant for this purpose. The argument ultimately came to this, that it is in the original agreement that the regulations common to the estate are to be found. We were invited to assume that every purchaser on the estate bought with knowledge of the terms of the restrictive covenant in the agreement and with knowledge of the fact that every other purchaser had entered into a similar covenant,

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or would in the future enter into such a covenant. Unless it is possible to draw an inference of that kind, it appears to me that the principle of the cases which have been referred to cannot possibly apply. In the present case I am quite unable to draw any such inference. We have before us two conveyances and two conveyances only. We know nothing whatever about the other houses on the estate, or the circumstances in which they were sold, whether or not they contained any, and what, restrictive covenants. The only conveyances which we have being the two in question, it is quite impossible to draw any inference as to any intention on the part of anybody to apply to this estate some common regulations which would be, and were, brought to the notice of all purchasers in such circumstances that each purchaser was entitled to infer that all other purchasers would be bound by them, and was willing to accept the liability towards every other purchaser. It is an aspect of the matter which is very important, in my judgment, that before you can apply this principle you must be able to infer from the facts that each purchaser contemplated that he was entering into a liability, not only to his vendor, but also to a number of other persons, which they could all directly enforce against him.

I may add this. When one looks at Mr. Fellows' own conveyance, it bears on the face of it, so far as it is permissible to look at it for this purpose, what seems to be a very clear indication that it was not the intention of anybody that Mr. Fellows should be entitled to enforce these covenants direct, because the conveyancing machinery adopted is one under which the vendors agreed on subsequent sales to take covenants from the purchasers, and to enforce those covenants at the instance of Mr. Fellows. That was a special provision which Mr. Fellows got put into his conveyance which does not appear in Mr. Nicholson's conveyance. That appears to me to be inconsistent with the view that Mr. Fellows was intended to get an independent right himself to sue subsequent purchasers on the footing that the original agreement was a sort of code that was going to be brought to the notice of all such purchasers. The inference can easily be drawn in a case where property is put up for sale by auction in lots. There the conditions of the sale are, so to speak, the charter or code which you must apply to the territory in which the regulations are to prevail. The fact that all the lots are not sold at the auction does not prevent the application of the principle. In the present case that element of proof, that foundation for the drawing of the necessary inference, is entirely absent, and we are completely in the dark as to the position with regard to any other purchaser of the estate. In my opinion the facts fall far short of anything which would entitle us to apply the principles relied upon.

That really disposes of the appeal, subject to one point. Mr. Grant relied on s. 56 of the Law of Property Act, 1925, but he conceded that if he was right on his first point and could enforce the covenant, he had no need to rely on s. 56, but if he was wrong on his first point, it would mean that the covenant was not a covenant for his benefit, and then s. 56 would not help him. The covenant is the covenant by Mr. Nicholson. The suggestion was that Mr. Fellows, and his successors in title, could take advantage of the covenant of Mr. Nicholson under the terms of the section. The section is in these words: "A person may take an immediate or other "interest in land or other property, or the benefit of any "condition, right of entry, covenant, or agreement over or "respecting land or other property, although he may not be "named as a party to the conveyance or other instrument." The conveyance is the conveyance, of course, to Mr. Nicholson. The covenant is the covenant of Mr. Nicholson relating to user as a private dwelling-house. Although Mr. Fellows was not a party, and the successors in title of Mr. Fellows were not parties, the argument is that they are entitled to take the benefit of it. Mr. Grant did not feel able to press that point, but Mr. Turnbull made a submission upon it which I must mention, and it is this. When the covenant in question by Mr. Nicholson is looked at, it is expressed to be a covenant with the parties hereto of the first part, their heirs and assigns, the parties of the first part being the Davidsons. Mr. Turnbull said that Mr. Fellows was an assign within the meaning of that phrase as used in the covenant, notwithstanding the fact that Mr. Fellows had taken his conveyance some two or three years before. In my opinion that is not the true construction of this covenant. It seems to me, reading the covenant in the light of the circumstances of the case at the time, that the assigns of the Davidsons who are referred to are such persons as thereafter would take from the Davidsons any part or unsold portion of the estate which still remained vested in them, and it does not as a matter of construction cover the previous assigns of the Davidsons. That being so, if that view be correct, it would be quite impossible to bring the matter within s. 56, because whatever else s. 56 may mean, it is, I think, confined to cases where the person seeking to take advantage of it is a person within the benefit of the covenant in question, if I may use that phrase. The mere fact that somebody comes along and says: " It would be useful to me if I could enforce that "covenant," does not make him a person entitled to enforce it under s. 56. Before he can enforce it he must be a person who falls within the scope and benefit of the covenant according to the true construction of the document in question. In the present case the present appellant does not fall within the benefit of the covenant, and in my opinion the argument on s. 56 fails. That, I think, deals with all the points in the case, and the appeal must be dismissed with costs.

LUXMOORE J. I agree, and I have nothing to add.

FARWELL J. I agree.

Appeal dismissed.

Solicitors: *T. & N. Blanco White; Laytons.*

H. C. G.

CLAUSON J.

1937

Dec. 15, 16.

1938

Jan. 25.

In re WHITE.

SKINNER *v.* ATTORNEY-GENERAL.

[1937. W. 1478.]

Revenue—Estate duty—Testator domiciled in Northern Ireland—Annuity under will to wife—Property outside Great Britain, partly in Northern Ireland—Investment in England during widow's life by executors of funds arising from sale of testator's estate outside England—Death of widow—Investments in England still subsisting—Cesser of annuity—Estate duty—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-ss.* 1, *para.* (*b*), 2; *s.* 4; *s.* 5, *sub-s.* 2; *s.* 7, *sub-ss.* 7, 10—*Finance Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14—*Government of Ireland Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 67), *ss.* 8, 20, 28, 61, 69—*Government of Ireland (Adaptation of the Taxing Acts) Order,* 1922—*Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *ss.* 24, 25.

A testator, having by his will, dated December 6, 1918, bequeathed (inter alia) a life annuity (increased by a codicil dated December 2, 1920) to his wife, and devised and bequeathed all his property in equal shares to two nephews, who were two of the executors under the will, subject to and charged with the payment of his debts and funeral and testamentary expenses, all Crown duties and the legacies and annuities bequeathed by the will, died on July 27, 1923, domiciled in Northern Ireland. The moneys from the sale and getting in of certain portions of his estate which at his death consisted of property outside England were later placed by his executors in English investments, and remained in them at his widow's death.

Under the Government of Ireland Act, 1920, the financial provisions of that Act and the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922, executive power in Northern Ireland, including the levying of estate duty, became exercisable by the Government of Northern Ireland. After the coming into force of the Government of Ireland Act, 1920, the levying of death duties in Ireland was governed by Acts which, until the coming into force of that Act, had prevailed in Northern Ireland and Great Britain. From that time those Acts, for the purpose of the levying of death duties in Northern Ireland, applied to Northern Ireland only.

On the testator's death, the Government of Northern Ireland, under the Finance Act, 1894, as modified by later Acts, including the Finance Act, 1914, levied estate duty on the whole of his estate except an interest in the proceeds of sale of certain real estate in the United States of America. All that he then had in England was personal estate of less value than 100*l.*, so that estate duty was not leviable in Great Britain. Immediately before his widow's death on February 5, 1936, his residuary estate which was charged to secure her annuity consisted of investments in England, investments in Northern Ireland and an interest in the proceeds of sale of property in the United States of America.

On his widow's death, the Inland Revenue authorities in England, acting under the Finance Act, 1894, as later modified, claimed duty in respect of the English investments, alleging that it was payable on her death because property passing on her death was, under s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894, to be deemed to include property in which she had an interest ceasing on her death.

On a summons to determine whether it was payable :—

Held, (1.) that the widow had an interest, ceasing on her death, in the English investments, that her charge securing the annuity was on the property in the residuary estate, and not on the residuary legatees' right of action against the executors, and that the English Revenue authorities' claim was therefore good in respect of the English investments, on which, accordingly, duty was payable.

Attorney-General v. *Watson* [1917] 2 K. B. 427, followed.

(2.) That the words "estate duty" in s. 5, sub-s. 2, of the Finance Act, 1894, mean estate duty levied or leviable in England, and cannot mean that levied or leviable in Northern Ireland under the Government of Ireland Act, 1920.

Attorney-General v. *Clarkson* [1900] 1 Q. B. 156, considered.

ADJOURNED SUMMONS.

This summons was taken out on behalf of the surviving executors of a testator who died in 1923, domiciled in Northern Ireland, to determine whether, on the death in 1936 of his widow, who was an annuitant under his will made in 1918 and under a codicil thereto made in 1920, estate duty became payable in England on any of the English investments in which the moneys from the sale and getting in of his estate (which, at his death, consisted of property outside England) were later invested by his executors during the widow's life, and remained so invested at her death.

The following statement of the facts is taken substantially from his Lordship's judgment :—

By his will dated December 6, 1918, the Right Honourable John Campbell White of Craigavad, County Down, Ireland (hereinafter called "the testator"), after appointing certain executors, bequeathed to his wife free of duty a life annuity of 5000*l.*, and after giving another annuity and certain legacies, devised and bequeathed all his property both real and personal to his nephews Edward John Skinner and Robert Skinner (who were two of the executors under the will) in equal shares, subject to and charged with the payment of his debts funeral and testamentary expenses and all Crown duties and the legacies and annuities bequeathed by his will.

By a codicil dated December 2, 1920, the testator increased his wife's life annuity from 5000*l.* to 7500*l.*

On December 23, 1920, the Government of Ireland Act, 1920, became law, and on November 22, 1921, the financial provisions of that Act, including provisions as to taxation, became operative.

On January 31, 1922, an Order in Council entitled the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922, came into force.

The position after the Order in Council stands as follows: as respects Irish services (which include the levying of estate duty) His Majesty's executive power (thus including the power of levying estate duty in Northern Ireland) is exercisable by the officers of the Government of Northern Ireland, while His Majesty's executive power of levying estate duty in England remains, as before, exercisable by the English Revenue authorities, and there is a corresponding division in the Exchequer and Consolidated Fund: see ss. 8 and 20 of the Government of Ireland Act, 1920. The levying of death duties in England remains governed by the relevant statutes in force before that Act became operative, and is subject to future regulations by the Parliament of the United Kingdom. The levying of death duties in Northern Ireland is governed by the Acts which, up to the operative date, had prevailed in Northern Ireland as also in Great Britain, but are for this purpose thereafter to be read as applying to Northern Ireland and no longer to the United Kingdom generally; and it is subject to future regulation by the Parliament of Northern Ireland: see s. 61 of the Government of Ireland Act, 1920. This scheme is worked out by the Order in Council, which derives its statutory efficacy from s. 69 of that Act.

On July 27, 1923, the testator died. In respect of his death the proper officers of the Crown in Northern Ireland, exercising in accordance with s. 8 of the Government of Ireland Act, 1920, the executive power in that behalf vested in His Majesty the King, levied estate duty upon the appropriate parts of his estate under the provisions of the Finance Act, 1894, as subsequently modified by various statutory provisions, including the Finance Act, 1914. The Act of 1894 as so modified by statutory provisions coming into force before December 23, 1920, continued to be operative in Northern Ireland by virtue of s. 61 of the Government of Ireland Act, 1920, subject to various modifying provisions to be found in the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922.

The testator at the date of his death was domiciled in Northern Ireland, and had no property in Great Britain except personal estate of the value of 66*l.*, and in view of the fact that that personal estate was of less value than 100*l.*, no estate duty became leviable by the officers of the Crown in Great Britain under the executive authority conferred on His Majesty the King by the Finance Act, 1894, as subsequently modified.

On February 5, 1936, the testator's widow died. Immediately before her death the estate of the testator charged by his will and codicil to secure her life annuity consisted in part of investments locally situate in England, in part of investments locally situated in Northern Ireland, and in part of an interest in the proceeds of sale of real estate situate in the United States of America. Thereupon a claim was put forward by the proper officers of the Crown in England acting under the executive authority vested in His Majesty the King by the Finance Act, 1894, as subsequently modified, for duty in respect of the English investments last mentioned, on the allegation that that duty was payable on property passing on the death of the widow, because by virtue of s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894, property passing on the death of the widow is to be deemed to include property in which the widow had an interest ceasing on her death.

This summons was taken out on May 1, 1936.

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Fergus D. Morton K.C. and *J. M. Whitaker* for the plaintiffs. The first question is whether the property in which the widow had an interest ceasing at the date of her death was situate outside Great Britain at the date of her death, or whether she had an interest ceasing at the date of her death in what are called the English investments. The property in which she had an interest was the whole of the testator's residuary estate.

In view of the decision in *Attorney-General* v. *Watson* (1) it cannot in this Court be contended on the plaintiffs' behalf that the testator's widow had not an interest in property ceasing on her death within s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894. The whole of the residue is the property to which the annuitant looks for payment of the annuity. According to *Attorney-General* v. *Watson* (1) the property deemed to pass under s. 2 is the residuary estate. [They referred to *Baker* v. *Archer-Shee* (2) and *Archer-Shee* v. *Garland*. (3)] It is true that the testator's widow had an interest in property; but that property was the entire residuary estate and nothing else.

The first question is, Where was the property in which she had that interest "situate" within the meaning of s. 2, sub-s. 2, of the Finance Act, 1894? The Court must consider where it was situate after the testator's death, and must consider also whether any event occurred between 1923 (the year of his death) and 1936 to change the situation of the property. The testator was domiciled in Northern Ireland, the will was a Northern Irish will, the proper forum of administration was Northern Ireland, and two of the trustees were described as resident there. It matters not that at that time the property was scattered. The residue as a whole was situate in Northern Ireland. The property in which the testator's widow was interested being the residue, somehow or other a local situation must be given to the residue as a whole and, as it is scattered, its situation is the forum of administration—namely, Northern Ireland: see *Attorney-General* v. *Watson* (1) and *Sudeley* (*Lord*) v. *Attorney-General*. (4)

(1) [1917] 2 K. B. 427.
(2) [1927] A. C. 844.
(3) [1931] A. C. 212.
(4) [1897] A. C. 11.

What is deemed to pass is certain property, to the extent of which a benefit accrues or arises by reason of the cesser of a party's interest. [They referred to s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894.] In the present case, the people who benefit by the cesser of the interest are the residuary legatees. A benefit accrues to them because property belonging to them is released from the burden of an annuity. The property belonging to them which is so released is, not the stocks and shares in the hands of the executors, in Great Britain and elsewhere, but the residuary legatees' right to have the residue, when ascertained, transferred to themselves: *Sudeley* (*Lord*) v. *Attorney-General.* (1) Neither the annuitant nor the residuary legatees had an interest in specific stocks and shares: each of them had a chose in action. [They referred to *Attorney-General* v. *Johnson.* (2)] In *Attorney-General* v. *Belilios* (3) the Court appears to have considered what was the interest of the persons who benefited. [They referred to *Adamson* v. *Attorney-General.* (4)]

If the plaintiffs are right on the first point, no further question arises and no estate duty will be payable, by reason of the Finance Act, 1894, s. 2, sub-s. 2. (5) If the defendant succeeds, the second question arises—namely, whether, if the widow has an interest, ceasing on her death, in the English investments, which form part of the residue, estate duty has already been paid in respect thereof within the meaning of s. 5, sub-s. 2, and s. 22, sub-s. 1, para. (*e*), of the Finance Act, 1894. (6) Sub-s. 2 was altered in 1914, save with regard to

(1) [1897] A. C. 11.

(2) [1907] 2 K. B. 885.

(3) [1928] 1 K. B. 798.

(4) [1933] A. C. 257.

(5) Sect. 2, sub-s. 2: "Property "passing on the death of the "deceased when situate out of "the United Kingdom shall be "included" (in 'property passing 'on the death of the deceased' in sub-s. 1) "only, if, under the "law in force before the passing "of this Act, legacy or succession "duty is payable in respect thereof, "or would be so payable but for "the relationship of the person to "whom it passes."

(6) Sect. 5, sub-s. 2: "If "Estate duty has already been "paid in respect of any settled "property since the date of the "settlement, the Estate duty shall "not, nor shall any of the duties "mentioned in the fifth paragraph "of the First Schedule to this Act, "be payable in respect thereof, "until the death of a person who "was at the time of his death or

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a surviving spouse. [They referred to the Finance Act, 1914, s. 14, and to Hanson on Death Duties, 8th ed., p. 224.]

The question to be determined is whether, on the testator's death in 1923, estate duty was paid on the whole of the personal estate. The plaintiffs contend that it was paid, under the Finance Act, 1894, as adopted by the legislation with regard to Northern Ireland, which in no way affected the wording of s. 5, sub-s. 2, or s. 22, sub-s. 1, para. (*e*). The Crown contends that it was not paid under the Finance Act, 1894, at all, and it must necessarily follow that the Crown is going to contend that it must be paid over again. That is a startling contention, because it follows that, as the result of the Government of Ireland Act, 1920, an estate in Ulster has to pay a large sum of estate duty which, but for the friendly relations between Northern Ireland and Great Britain in 1920, would not have been payable.

There is nothing at all in any of the Acts which affects the relief given by s. 5, sub-s. 2, of the Finance Act, 1894. The whole estate bore the duty under the Finance Act, 1894, and under no other statute, as it would also have done if the Government of Ireland Act, 1920, had never been passed.

At the testator's death the statutes dealing with the position with regard to estate duty were the English Finance Acts, as modified by the Government of Ireland Act, 1920. [They referred to the Government of Ireland Act, 1920, ss. 1, 20, 21, 28, 61 and 69.]

As to the regulations under s. 69, see the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922.

In s. 2, sub-s. 2, of the Finance Act, 1894, the Court must read " when situate out of the United Kingdom, excluding "Northern Ireland." In s. 5, sub-s. 2, there is no change, nor is there in s. 7, sub-s. 7, or in s. 22, sub-s. 1, para. (*e*). On the testator's death estate duty was paid under s. 2, sub-s. 2, of the Finance Act, 1894. It was paid in respect of all his

"had been at any time during the "continuance of the settlement "competent to dispose of such "property."

Sect. 22, sub-s. 1, para. (*e*): "In this Part of this Act, unless "the context otherwise requires:— ". . . . (*e*) The expression 'Estate "'duty' means Estate duty under "this Act."

property, except in so far as that property represents the proceeds of sale of real estate in the United States of America. If it was not paid under that Act, it is difficult to see under what Act it was paid. The argument for the Crown is, on this point, quite technical and devoid of merit.

The question whether estate duty was paid under the Finance Act, 1894, must be considered in the light of ss. 61 and 69 of the Government of Ireland Act, 1920, and s. 25 of the Finance Act, 1936.

J. H. Stamp for the Attorney-General. In dealing with s. 2, sub-s. 2, of the Finance Act, 1894, all that has to be considered is the property which is the subject of the deceased person's interest. That is not a chose in action vested in the residuary legatees: they have no charge on or interest in it. The annuitant's interest is entirely paramount to any chose in action vested in the residuary legatees: that proposition is self-evident. The annuitant, on the other hand, has a chose in action which brings him into direct relation with the subject-matters of charge. The subject-matters of charge are the particular assets that form the security from which the annuity is derived, i.e., in the present case, the assets in this country. That an annuitant has an "interest" for this purpose is not open to question in this Court, because it has already been decided in *Attorney-General* v. *Watson.* (1) If the word "interest" is to be given any natural meaning whatever in s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894, it must include a person who has a charge on property to secure an annuity.

The point against the plaintiffs is firmly established by reading s. 2, sub-s. 2, in conjunction with s. 7, sub-s. 7: those provisions show clearly that the measure of the value of the benefit is the property itself and has nothing to do with the rights of the successors.

On the second question the Crown's case is that in fact, from the moment of the passing of the Government of Ireland Act, 1920, there were two estate duties: and that Act will prove unworkable unless those two estate duties are separated.

(1) [1917] 2 K. B. 427.

It is not the case that the Irish duty is payable only under the Finance Act, 1894. It would not be payable at all if that Act stood alone. The only duty payable would be in the United Kingdom. The imposition of the Irish estate duty is on a different subject-matter. [He referred to s. 28 of the Government of Ireland Act, 1920.]

If there were only one estate duty, as is suggested on behalf of the plaintiffs, it would be necessary to aggregate the two subject-matters for all purposes. That would be a very far-reaching proposition, because it is often found that a person domiciled in Northern Ireland has a life estate under an English settlement. In those cases there would have to be a duty, in Northern Ireland on the deceased's free estate and, in this country, on the interest under the settlement: and, if the argument for the plaintiffs is right, the second would have to be aggregated. That view, however, must be entirely wrong. In this country the duty would be properly assessable only on the interest under the settlement, in Ireland only on the Irish estate. The question shortly is whether, for the purposes of estate duty in England, "estate duty" from 1920 excludes estate duty payable in Northern Ireland.

The Finance Act, 1936, makes the matter quite plain, for it provides that the exemption shall apply in the case of persons dying after it comes into force; that means that it shall not apply to persons dying before it comes into force: *Ormond Investment Co.* v. *Betts.* (1) On that principle *Attorney-General* v. *Clarkson* (2) was decided. There is really no ambiguity at all. The Finance Act, 1936, must contemplate, in s. 24, the expression "estate duty" being, from that moment, equivocal. It relates to different subject-matter and a different executive and may be, and often is, charged at a different rate.

Fergus D. Morton K.C. in reply. The second point turns on the construction of an English Act of Parliament, and may be expressed by asking the question whether, in the events which happened, estate duty was paid on the testator's estate

(1) [1928] A. C. 143.

(2) [1900] 1 Q. B. 156.

within the meaning of s. 5, sub-s. 2, of the Finance Act, 1894.

Cur. adv. vult.

1938. Jan. 25. CLAUSON L.J. [having stated the facts substantially as set out above :] Having regard to the decision in *Attorney-General* v. *Watson* (1) it is now settled law that such an annuitant as the widow was in this case has an interest ceasing on her death in the property on which the annuity was secured. It follows, in my view, that the claim of the English Revenue authorities was correctly made that estate duty was leviable upon the widow's death upon the principal value of the investments in question to the extent to which a benefit accrued or arose by the cesser of the widow's interest: see s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894; such extent to be quantified by the process of valuation indicated in s. 7, sub-s. 7, of the Act.

In view of the fact that the annuity is charged by the will and codicil not only upon the investments now in question but also on other property forming part of the testator's estate, it is obvious, and this was not, I think, questioned, that, in measuring the extent of the property in respect of which the duty is leviable by the English Revenue authorities, the annuity must be treated as charged proportionately upon the various items of property constituting the residuary estate.

An answer suggested to this claim was that the widow had no interest in the investments in question but had an interest only in a chose in action consisting of the right of the residuary legatees to sue in the proper forum of administration, which it was suggested was Northern Ireland, to enforce against the executors a claim for the proper administration of the residuary estate, and it was accordingly suggested that the property in which the widow had an interest was property situate out of Great Britain; and it was, I think, admitted that, if the property in which she had an interest is to be taken to be property out of Great Britain,

(1) [1917] 2 K. B. 427.

estate duty would not now be leviable on it by the English Revenue authorities in view of the provisions of s. 2, sub-s. 2, of the Act, coupled with the relevant provisions of the Government of Ireland Act, 1920, and of the succeeding Orders in Council.

This contention put forward against the Crown's claim in my judgment breaks down because the suggested analysis of the legal position is erroneous. The widow had in respect of her annuity a charge not on the right of the residuary legatees to sue the executors, but on the property which constituted the residuary estate, and, if that be the true view, the claim of the English Revenue authorities must so far succeed in respect of the investments in question—namely, those which form part of the residuary estate, and are in fact admittedly locally situate in Great Britain.

It was next urged on behalf of the executors that in view of the provisions of s. 5, sub-s. 2, of the Finance Act, 1894, as modified by s. 14 of the Finance Act, 1914, they were protected against part at least of the claim by reason of the fact that estate duty had already been paid in respect of some part at least of the property represented by the investments in question since the testator's death, and it was admitted, as I understood, that this contention would be sound if such estate duty had in fact been paid. It was, however, pointed out on behalf of the Crown that this contention could succeed only if the estate duty already paid (which was, of course, estate duty levied in Northern Ireland under the legislative provisions applicable in Northern Ireland at the date of the testator's death) was comprised in the expression " estate duty " in the Finance Act, 1894, s. 5, sub-s. 2, as that Act was operative in Great Britain at the date of the widow's death. In my view the phrase " estate duty " in this section means estate duty levied or leviable in virtue of His Majesty's executive powers at a date between the coming into operation of the Finance Act, 1894, and November 22, 1921 (when the financial provisions of the Government of Ireland Act, 1920, became operative), but as regards estate duty levied or leviable after November 22, 1921, the phrase "estate duty" in the Act of 1894, in so far as it is operative in Great Britain, comprises estate duty levied or leviable in virtue of His Majesty's executive powers exercisable in England, but cannot and does not comprise estate duty levied or leviable in virtue of those executive powers of His Majesty which are delegated by him, by virtue of the Government of Ireland Act, 1920, to the executive officers of the Crown acting in Northern Ireland, and are exercised under the authority of statutes which are operative in Northern Ireland only in relation to Northern Ireland, and subject to the regulation of the Legislature of Northern Ireland. In other words, the estate duty levied in Great Britain since the coming into operation of the financial provisions of the Government of Ireland Act, 1920, is a different duty from the duty levied in Northern Ireland since the coming into operation of those financial provisions, and the expression "estate duty" in s. 5, sub-s. 2, of the Finance Act, 1894, must for all purposes relevant to the present claim be confined to duty levied under the executive powers of His Majesty in Great Britain. This result seems necessarily to follow if the abstract which I have set out above of the operation of the Government of Ireland Act, 1920, and the subsequent Order in Council, be correct.

It was pointed out that this view of the operation of the Government of Ireland Act, 1920, is the only view consistent with the provisions of s. 28 of that Act, which plainly envisage the existence of two separate and possibly overlapping duties, and further that on any other view neither s. 4 nor s. 7, sub-s. 10, of the Act of 1894 could have effect without producing anomalous results.

For the reasons I have thus indicated the executors are not in my judgment entitled to any remission of duty by reason of the operation of s. 5, sub-s. 2, of the Act.

I may add that the correctness of this view of the operation, in the circumstances, of s. 5, sub-s. 2, of the Act appears to be confirmed by the provisions of the Finance Act, 1936, s. 25, which seems quite clearly to proceed upon the view of the operation (in such circumstances as those of the present case) of s. 5, sub-s. 2, which I hold to be the correct view, and it may well be that, having regard to the principles laid down in *Attorney-General* v. *Clarkson* (1), the existence of this latter statute would alone be conclusive upon the point.

I shall accordingly declare that on the death of the widow estate duty became payable in England in respect of the investments in England held by the plaintiffs as part of the testator's estate at the date of the widow's death, such duty to be assessed under s. 2, sub-s. 2, of the Finance Act, 1894, and in accordance with the provisions of s. 7, sub-s. 7, of the same Act, in respect of so much of the annuity as is properly apportionable to the said investments.

The plaintiffs must pay the costs of the Attorney-General.

Solicitors: *Russell & Arnholz, for White, McMillan & Wheeler, Belfast; Solicitor of Inland Revenue.*

(1) [1900] 1 Q. B. 156.

K. R. A. H.

NORTH LEVEL COMMISSIONERS *v.* RIVER WELLAND CATCHMENT BOARD.

LUXMOORE J.

1937

Feb. 2, 3; *May* 24, 25, 26, 27; *Oct.* 13, 15; *Dec.* 13.

[1936. N. 143.]

Land drainage—River—Artificial bank—Catchment Board—Liability to maintain artificial bank—" Main river "—" Bank " adjoining the " river "—North Level Act, 1857 (20 & 21 *Vict. c. cix.*), *s.* 38—*Land Drainage Act,* 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 4, *sub-s.* 1 (*a*).

On the south side of the tidal river W., and at varying distances, there ran an artificial bank known as the B. bank, separated by a considerable area of land from another artificial bank on the river side called the C. bank, which itself ran at a short distance from the natural bank of the river W. The land between the B. and C. banks was liable to flooding.

The B. bank had been in existence for many centuries, and up to the year 1857 all powers, duties and obligations regarding the B. bank were vested in the Bedford Level Corporation. By the North Level Act, 1857, s. 38, and an Order of the Minister of Agriculture, all these powers and duties, including those relating to the maintenance of the portion of the B. bank the subject of the action, became vested in the plaintiffs, the North Level Commissioners.

It was admitted that down to the date of the passing of the Land Drainage Act, 1930, the liability to maintain and repair the relevant portion of the B. bank was vested in the plaintiffs. The Act of 1930 constituted drainage districts consisting of catchment areas and provided for the constitution of drainage boards called "Catchment Boards." The Act conferred various powers on these catchment boards. In pursuance of the powers and provisions of this Act the defendants were constituted the River W. Catchment Board, and they, pursuant to s. 4, sub-s. 1 (*a*), of the Act of 1930, submitted a scheme to the Minister which was duly confirmed. Under the scheme there was transferred to the defendant board "generally all [such] rights, powers, duties, " obligations and liabilities over or in connection with the main " river (the river W.) as were immediately before the commence- " ment of the said Act vested in or to be discharged by any " drainage authority. . . . ."

The plaintiffs claimed that under this scheme and s. 4, sub-s. 1 (*a*), and the definitions of " Main River " and " Banks " in s. 81 of the Act of 1930 (1), their liability to repair and maintain the river W., including the B. bank, had been transferred to the defendants. It was admitted, however, that this liability did not extend to more than one-half of that portion of the B. bank which was included in the catchment area of the defendant board:—

(1) See note (2) post, p. 384.

Held, that the B. bank was not included in the expressions " Main River " and " Banks " as defined in s. 81, since it was not a " bank " adjoining the channel of the river W., and it did not " confine " the waters of that river.

Held, further, that the maxim " generalia specialibus non derogant " as explained in *Blackpool Corporation* v. *Starr Estate Co.* [1922] 1 A. C. 27 applied, and the relevant provisions of the North Level Act, 1857, which imposed the obligations and liabilities to maintain and repair the portion of the B. bank the subject-matter of the action on the plaintiffs and their predecessors in title, still remained in force. The plaintiffs were an internal drainage board of the river W. catchment area under the Land Drainage Act, 1930, and as such were liable for the maintenance and repair of the portion of the B. bank comprised in that area. The defendants were under no liability for its maintenance or repair or to pay any of the moneys claimed by the plaintiffs.

Action.

In these proceedings the plaintiffs (a drainage authority) sought a declaration (inter alia) that an artificial bank (known as the " Barrier Bank ") situate on the south-east side of a river known as the river Welland in the counties of Northampton and Lincoln, was a bank of the said river Welland and a bank within the meaning of the Land Drainage Act, 1930 ; and was also by reason of the said Act and a scheme dated April 7, 1932, made under s. 4, sub-s. 1 (*a*), thereof transferred to and vested in the defendant board ; further that the defendant board was at all times liable to maintain such bank by reason of the fact that it was within the area and under the jurisdiction of the defendant board. The " Barrier "Bank " (so far as it formed the subject of this action) lay between the village of Peakirk in the county of Northampton and a place called Brotherhouse Bar in the county of Lincoln.

The defendant board—a Catchment Board constituted under the Land Drainage Act, 1930—denied (inter alia) that they were under any liability to repair the said bank.

A statement of facts was agreed between the parties. The following statement is taken from the judgment of the learned judge, and comprises such facts as were in his opinion material to the questions at issue.

The river Welland is tidal at all points material to be considered in this action. Coming down the river from Peakirk to Brotherhouse Bar in a north-east and north direction is an artificial bank known as the Deeping High Bank. On the other side of the river there is, at a short distance from the natural bank of the river (which was referred to as the Fisherman's Bank), another artificial bank called the Cradge or Counter Bank, while beyond the Cradge Bank and at a distance which varies from about 50 yards at its nearest point to approximately three-quarters of a mile at its farthest point, there is a third artificial bank, the Barrier Bank. There is a very considerable acreage of land lying between the Deeping High Bank and the Barrier Bank. This land is known as the Crowland and Cowbit Washes. The dry weather flow of the Welland is within the channel running between the Deeping High Bank and the Fisherman's Bank on the other side of the river; but at spring tides the water flows between the Deeping High Bank and the Cradge Bank and the whole of the intervening land is then submerged. The top of the Cradge Bank is about 15·75 feet above ordnance datum, while during the highest spring tides the river rises to approximately 14·25 feet above ordnance datum and is therefore about 1·5 feet below the top of the Cradge Bank. In times of abnormal or prolonged rainfall the river overflows the Cradge Bank and the flood water spreads substantially over the whole of the land between the Deeping High Bank and the Barrier Bank. The last mentioned bank prevents the flood water extending over the land which lies beyond the Barrier Bank.

Between the Cradge Bank and the Barrier Bank there is also an artificial channel known as the New River, which is controlled by a sluice gate at its junction with the river Welland so as to prevent any of the tidal water running into it. The New River operates as the main drainage channel of the Crowland and Cowbit Washes.

The Barrier Bank was erected about 1650 to defend the land, lying on the side of the Barrier Bank remote from the river Welland, from the flood waters coming from the river and the Crowland and Cowbit Washes. The portion of the

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Barrier Bank between Peakirk and Brotherhouse Bar was erected by a number of gentlemen who were known as the "Adventurers." They derived their powers from an Act of Parliament passed on May 29, 1649, by the Commonwealth Parliament which divided the Bedford Level into three parts: the North Level, the Middle Level and the South Level. The portion of the Barrier Bank to the north of Brotherhouse Bar between that place and Spalding was erected by the "Adventurers" of Deeping Fen about the same time as the part of the Barrier Bank between Peakirk and Brotherhouse Bar was erected.

By an Act passed in 1753 (27 Geo. 2, c. 19) the North Level was divided into five districts. The first of these included and had as its northern boundary that part of the Barrier Bank which runs from Peakirk to Crowland. The fifth district included and had as its northern boundary that part of the Barrier Bank which runs from Crowland to Brotherhouse Bar. The last mentioned Act established the North Level Commissioners as the body charged with the duty of controlling the drainage of the North Level, but the Act did not alter or affect the powers, duties and obligations with regard to the Barrier Bank, and these remained in the Bedford Level Corporation until the passing of the North Level Act, 1857 (20 & 21 Vict. c. cix.). It was enacted by s. 38 of this Act that all the powers, duties, authorities and jurisdictions of the Bedford Level Corporation including the maintenance of the Barrier Bank between Peakirk and Crowland should be vested in and be used and exercised by the North Level Commissioners. On October 5, 1928, an Order, the short title of which is the Postland Drainage Order, 1928, was confirmed by the Minister of Agriculture under the Land Drainage Act, 1861, constituting the Postland Drainage District. This Order (by s. 5) empowered the North Level Commissioners to acquire by agreement what is referred to in the Order as the south bank of the river Welland from West Dam (i.e., Crowland) to Brotherhouse Bar together with the foreshore and osier beds containing 93 acres and 3 roods of land and two cottages at Brotherhouse Bar. The property referred to as the south bank of the Welland is admittedly that part of the Barrier Bank which runs between Crowland and Brotherhouse Bar. The section provided that when and so soon as that part of the Barrier Bank had been acquired, the liability for its maintenance should be transferred from the owners and occupiers then responsible for its maintenance under and by virtue of the provisions of s. 72 of an Act of Parliament passed in the year 1830 (11 Geo. 4, c. liii.) intituled "an Act for improving the "drainage of the lands lying in the North Level, part of "the Great Level of the Fens called Bedford Level, and in "Great Portsand in the Manor of Crowland, and for "providing a navigation between Clow's Cross and the Nene "Outfall Cut." It was further enacted by the Postland Drainage Order, 1928, that the maintenance of the part of the Barrier Bank between Crowland and Brotherhouse Bar should thereafter form part of the general works of the North Level Commissioners authorized to be done by the several Acts of Parliament relative to the North Level, and that the provisions of the said Acts of Parliament should apply in all respects to that part of the said Bank as if it had been originally one of the banks authorized to be constructed and maintained by the North Level Commissioners.

On June 28, 1929, the portion of the Barrier Bank between Crowland and Brotherhouse Bar referred to in s. 5 of the Postland Drainage Order, 1928, with the foreshore, osier beds and cottages there mentioned was conveyed to the plaintiffs by the then owner, subject among other things "to the entire liability for the maintenance of the" portion of the Barrier Bank thereby conveyed.

H. J. Wallington K.C. and *S. L. Elborne* for the plaintiffs. The real question for the decision of the Court is which of the two bodies, the North Level Commissioners or the River Welland Catchment Board, is responsible for the maintenance of the Barrier Bank. It is submitted that it is a bank of the river Welland. Up to the present time the plaintiffs have in fact maintained the Bank under statutory provisions;

but the Land Drainage Act, 1930, has now cast the burden upon the defendants: see s. 4, sub-s. 1 (*a*). (1)

The defendants' contention that the Minister of Agriculture has identified the main river Welland in such a way as to make it clear that the Bank is not a bank of that river is not quite accurate, because it seems plain that in so acting he quite clearly indicated that he was not intending to decide whether this was a bank of the river or not. In his view that question was one either for the agreement of the parties or the determination of the Court. Under s. 4, sub-s. 1 (*a*) (i.), of the Land Drainage Act, 1930 (1), a scheme was submitted by the defendants to the Minister of Agriculture, and, as slightly amended, the scheme was confirmed by the Minister; its date is April 7, 1932. The Order by clauses 1 and 10 transfers to the Catchment Board the main river Welland together with its bed and banks, and all duties, liabilities, and obligations of any drainage authority with regard to the main river and its bed and banks. The Barrier Bank was a bank of the river Welland. Under this Order therefore there was transferred to the defendants the Bank and the obligation of repairing it: see s. 81 of the Act of 1930 for the definition of "main river" and "banks." (2) This seems quite clearly to

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(1) Land Drainage Act, 1930, s. 4, sub-s. 1: "Every Catchment Board—

"(*a*) shall as soon as may be "after it has been constituted "prepare and not later than such "date as may be appointed by the "Minister for the purposes of this "provision, either generally or in "relation to a particular Catch-"ment Board, submit to him for "confirmation a scheme making "provision—

"(i.) for the transfer to the "Catchment Board of all such "rights, powers, duties, obliga-"tions and liabilities (including "liabilities incurred in connec-"tion with works) over or in "connection with the main "river as were immediately "before the commencement of "this Act vested in or to be "discharged by any drainage "authority, and of any property "held by the authority for the "purpose of, or in connection "with, any functions so trans-"ferred; and

"(ii.) for any matters supple-"mental to or consequential on "the transfer aforesaid;

"and (*b*) . . . ."

(2) Sect. 81: "In this Act [Land "Drainage Act, 1930], unless the "context otherwise requires, the "following expressions have the "meanings hereby respectively "assigned to them, that is to say:—

"'Main river' includes any "structure or appliance for con-"trolling or regulating the flow of contemplate that an embankment, such as this, may be a bank of the river.

The Barrier Bank, or what may be termed the effective part of it, is within the exclusive jurisdiction of the defendants; this is so by reason of the Act of 1930.

[A lengthy discussion took place as to the areas of Catchment Boards indicated on the maps prepared and sanctioned by the Minister of Agriculture; and as to the banks being in these different areas, the maps being conclusive evidence of the banks shown thereon as being within a particular catchment area.]

Whatever may be the boundary, if the map and the Order of 1932 say, as it is submitted they do, that the banks shall go with that part of the channel of the river which the Minister of Agriculture has marked as to be treated as the main river, then, if it is proved by the plaintiffs that this is a bank of the main river, whatever the boundary of the area may be, the obligations with regard to this bank are now on the Welland Catchment Board.

[The matter was adjourned on February 3 sine die for the parties to agree on a statement of admitted facts.]

1937. May 24. [Counsel for the plaintiffs, after referring to the agreed statement of facts, recapitulated his previous argument and the sections of the Land Drainage Act, 1930, to which he had referred during the proceedings in February.]

Sect. 6, sub-s. 1, of the Land Drainage Act, 1930, is also important and under this section the obligation to repair has fallen on the defendants. (1) See also s. 34, sub-s. 1,

"water in or out of the channel, "and situate therein or in any part "of the banks thereof other than "any such structure or appliance "which is vested in or controlled "by an internal drainage board:

"'Banks' means banks, walls, "or embankments adjoining or "confining, or constructed for the "purposes of or in connection with, "any channel or sea front, and "includes all land between the "bank and low-water mark."

(1) Land Drainage Act, 1930, s. 6, sub-s. 1: "The powers con-"ferred by this Act on drainage "boards shall, so far as concerns "the main river, including the "banks thereof, and drainage "works in connection with the "main river, be exercisable solely "by the Catchment Board."

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North Level Commissioners v. River Welland Catchment Board.

of the Act of 1930, on which reliance is placed. (1) The plaintiffs, it is submitted, do not come within the scheme of the Minister of Agriculture.

[His Lordship having raised the question whether further information might not be required concerning any Orders made or schemes approved by the Minister relating to the area known as the Nene Catchment Area and which might be material as affecting the duties of the North Level Commissioners, and the question whether, if the bank in question was a drainage work in connection with the main river, the question should not be referred to the Minister or the arbitration of a single arbitrator at the option of the parties in lieu of the jurisdiction of the High Court, and certain other matters relating to boundaries, the matter was again adjourned sine die.]

Oct. 13. [The required information was produced to the Court and the agreed facts re-stated.]

A. M. Trustram Eve K.C. and *G. D. Squibb* for the defendants. As regards the Bank, physically on the land it did not adjoin the river or confine the water which flowed in the river. The purpose for which it was constructed must also be regarded. Under the old Acts affecting the draining of this area and the depositions obtained from the Record Office, it was for the purpose of keeping water out of the

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(1) Sect. 34, sub-s. 1: "Every "drainage board acting within its "district shall have power—

"(*a*) to maintain existing "works, that is to say, to "cleanse, repair or otherwise "maintain in a due state of "efficiency any existing water-"course or drainage work;

"(*b*) to improve any existing "works, that is to say, to deepen, "widen, straighten or other-"wise improve any existing "watercourse, or remove mill "dams, weirs or other obstruc-"tions to watercourses, or "raise, widen, or otherwise "improve any existing drainage "work;

"(*c*) to construct new works, "that is to say, to make any "new watercourse or drainage "work or erect any machinery "or do any other act not herein-"before referred to, required "for the drainage of the area "comprised within their dis-"trict:

"Provided that a Catchment "Board shall not, by virtue only "of this subsection, be taken to "be authorised to do any work "otherwise than in relation to the "main river."

North Level and not for the purpose of the river Welland. If the plaintiffs are right in their contention, all wash between the Barrier Bank and the river would be part of the "bank" within s. 81 of the Land Drainage Act, 1930.

The plaintiffs are liable for the repair and maintenance of the Barrier Bank and not the defendant Catchment Board.

H. J. Wallington K.C. in reply.

Cur. adv. vult.

Dec. 13. LUXMOORE J. The North Level Commissioners seek in this action to establish that the River Welland Catchment Board are liable for the maintenance and repair of part of an artificial bank situate on the south-east and east sides of and at some little distance from the present channel of the river Welland. The bank is known as the Barrier Bank and it extends from the village of Peakirk in the county of Northampton to the town of Spalding in the county of Lincoln. The part of the bank which forms the subject of this action extends from Peakirk to a place called Brotherhouse Bar in the county of Lincoln. The defendants deny liability to repair.

The material facts appear to me to be the following :—[His Lordship stated the facts as set out above.]

It is admitted that at the date of the passing of the Land Drainage Act of 1930 the liability to maintain and repair the Barrier Bank between Peakirk and Brotherhouse Bar was in the circumstances already stated vested in the North Level Commissioners, the necessary powers to do so being derived from the North Level Act, 1857, and the Postland Drainage Order, 1928. The Land Drainage Act, 1930, by s. 1 constituted drainage districts consisting of catchment areas. One of these catchment areas is the area the drainage of which is directed to the river Welland : see s. 1, sub-ss. 4 and 5, and s. 2, sub-s. 1, of the Act, and Part 1 of the First Schedule thereto. By s. 1, sub-s. 3, of the Act it is provided that a drainage board "shall exercise a general supervision over "all matters relating to the drainage of land within its "district and shall have such other powers and perform such "other duties as are conferred or imposed on drainage "boards" by the Act.

Sect. 3 provides for the constitution of the drainage boards of the various catchment areas and the appointment of members thereof. These drainage boards are called "Catchment Boards." Sect. 4 provides that every "Catchment "Board" shall as soon as may be after it has been constituted prepare and submit to the Minister of Agriculture for confirmation a scheme making provision for (*a*) (i.) "the transfer "to the Catchment Board of all such rights, powers, duties, "obligations and liabilities . . . . over or in connection "with the main river as were immediately before the commencement of this Act vested in or to be discharged by "any drainage authority, and of any property held by the "authority for the purpose of, or in connection with, any "functions so transferred; and (ii.) for any matters supplemental to or consequential on the transfer aforesaid. . . . ." The section contains provisions relating to the procedure to be adopted with regard to the confirmation of a scheme by the Minister. Sect. 5 imposes on the Minister the duty of preparing in relation to each catchment area a map determining the extent of the catchment area and showing by a distinctive colour that part of the channel of the river which is to be treated as the main river and provides for the approval of the map by the Minister with or without variations. Sub-s. 4 of the same section provides that the map of any catchment area when approved shall be conclusive evidence for all purposes as to the extent of the catchment area and as to what is the main river. Sect. 6, sub-s. 1, provides that the powers conferred on drainage boards shall, so far as concerns the main river, including the banks thereof, and drainage works in connection with the main river, be exercisable solely by the Catchment Board, while sub-s. 3 of this section provides that if the main river or any part of it is at the commencement of the Act vested in any other drainage authority, it shall by virtue of this Act vest in the Catchment Board. Sect. 7 provides that a Catchment Board shall exercise a general supervision with respect to the drainage of the catchment area, and may, for the purpose of securing the efficient working and maintenance of existing drainage works within the catchment area and the construction of such new drainage works as may be necessary, give such general and special directions as they consider reasonable for the guidance of the internal drainage boards with respect to the exercise and performance by those boards of their powers and duties as such. The rest of the section imposes a fetter on the powers of the internal drainage boards by making the consent of the Catchment Board essential in the cases specified in the section, and empowers the Catchment Board in certain specified areas to execute the necessary work at the expense of the internal drainage board. Sect. 10 confers a general power on the Catchment Board to exercise the powers of any internal drainage board in case of default by that board. By s. 34, sub-s. 1, every drainage board acting within its district is given power to maintain repair and improve existing watercourses or drainage works and to construct new works, but it is expressly provided that a Catchment Board shall not by virtue of the powers conferred only by the sub-section be taken to be authorized to do any work otherwise than in relation to the main river.

Pausing here it is to be observed that the Act itself imposes no obligation or liabilities on the Catchment Board, except with regard to the main river including the banks thereof and drainage works in connection with the main river. Apart from the main river and its banks the duty imposed on the Catchment Board is in the main to supervise the work of the internal drainage boards, and, in case of the failure of any of the last mentioned boards to fulfil their obligation, to carry out the necessary work at the expense of the internal drainage board in default. Even with regard to the main river the Act imposes no liabilities or obligations. If any liability or obligation is to be imposed in this respect it can only be imposed by a scheme made by the Catchment Board under s. 4 and confirmed in due course by the Minister of Agriculture.

The Act contains an interpretation section (s. 81) in which the expressions "main river," "banks," "internal drainage "district" and "internal drainage board" are respectively defined in these terms:—

"Main river" includes any structure or appliance for "controlling or regulating the flow of water in or out of "the channel, and situate therein or in any part of the "banks thereof other than any such structure or appliance "which is vested in or controlled by an internal drainage "board."

"Banks" are defined as meaning "banks, walls, or "embankments adjoining or confining, or constructed for "the purposes of or in connection with, any channel or sea "front, and includes all land between the bank and low- "water mark.

"Internal drainage district" means a drainage district "within a catchment area or, in the case of a drainage "district situate partly within and partly without a catch- "ment area, so much thereof as is situate within the catchment "area, and 'internal drainage board' means the drainage "board of an internal drainage district."

In March, 1931, the Minister in pursuance of the provisions of the Land Drainage Act, 1930, s. 5, approved a map of the Welland catchment area. In that map the area is shown as surrounded by a blue verge line, while the main river is coloured red. As originally approved the main river comprised not only the present channel of the river Welland but also the New River. The Minister of Agriculture subsequently in March, 1932, varied the map under the powers conferred on him by s. 5, sub-s. 3, by confining the main river to the present channel of the Welland and taking out of the description of the main river the stream known as the New River. It is difficult to determine the precise position of the blue verge line shown on the map at the point in relation to the Barrier Bank, but this difficulty has been set at rest by reference to the Minister of Agriculture, for on July 2, 1937, in answer to an inquiry by the solicitors to the North Level Commissioners, an officer of the Ministry of Agriculture wrote stating that the dividing line between the Welland and Nene catchment areas was the centre of the top of the bank which lies between these two catchment areas. This statement has been accepted by the plaintiffs and defendants, and for the purposes of this action it is agreed that the half of the Barrier Bank between Peakirk and Brotherhouse Bar nearer to the present channel of the Welland is included in the catchment area of the river Welland, while the other half of the Barrier Bank between the points mentioned is outside that catchment area.

In pursuance of the powers and provisions of the Land Drainage Act, 1930, the defendants were constituted the River Welland Catchment Board in the beginning of the year 1932, and shortly afterwards the Board submitted to the Minister for confirmation a scheme in accordance with the provisions of s. 4, sub-s. 1 (*a*), of the Act. The scheme was in due course confirmed by the Minister.

It is under this scheme that the plaintiffs contend that the defendant Board is under liability to maintain and repair the portion of the Barrier Bank in question; but it was admitted that, having regard to the contents of the map to which I have already referred, that liability cannot extend beyond that half of the portion of the Barrier Bank which is included in the catchment area of the defendant Board. The scheme is stated to be submitted under s. 4, sub-s. 1 (*a*), of the Land Drainage Act, 1930, and to be for the transfer to the River Welland Catchment Board (i.) "of all such "rights, powers, duties, obligations and liabilities" incurred in connection with all work in progress for the extension of the outfall of the river Welland seawards more particularly referred to hereafter over and in connection with the "main "river" as defined on the map of the river Welland catchment area sealed by the Minister of Agriculture on March 9, 1931, and varied on March 3, 1932, as were immediately before the commencement of the Act vested in the Welland Drainage Board and the River Welland Outfall Trustees respectively and discharged by them, and of the property held by the said two authorities for the purposes of and in connection with the functions so transferred. Then follow transfers of specific properties which do not include any part of the Barrier Bank. These transfers are followed in cl. 9 by a transfer in these words: " and generally all such rights, powers, "duties, obligations and liabilities over or in connection with "the main river as were immediately before the commencement of the said Act vested in or to be discharged by any "drainage authority, and of any property held by any such "authority for the purposes of, or in connection with such "rights, powers, duties, obligations and liabilities so far as "the same have not been hereby specifically transferred."

This is the clause which is relied on by the plaintiffs as transferring from them to the defendants the liability to maintain and repair the portion of the Barrier Bank in question. It is to be observed that there is no express mention of the Barrier Bank or any part of it in this clause or indeed elsewhere in the scheme, and it seems plain that this clause cannot transfer any such liability unless it can be shown that on the true construction of the Land Drainage Act, 1930, the term " main river " necessarily includes the Barrier Bank. Mr. Wallington argued that the Barrier Bank was in fact included because in a number of Acts of Parliament and documents the Barrier Bank was admittedly referred to as the south bank of the river Welland. References to the material passages in these Acts and documents are set out in para. 14 of the agreed statements of facts; but it is to be noted that there are many other references to the Barrier Bank set out in that paragraph which are couched in different language. For instance, the Barrier Bank is sometimes referred to as " a Bank defending the North Level "from the River Welland "; and in one case where the Barrier Bank is referred to as the south bank of the river Welland there are statements which show that it was constructed to defend the North Level from and against land floods.

But even assuming that the Barrier Bank was universally known and referred to as the south bank of the river Welland at the time when the Land Drainage Act, 1930, was passed, this fact would not be decisive of the case, for the Land

Drainage Act, 1930, contains definitions of the terms "Main "River" and "Banks"; and unless the Barrier Bank is included in such definitions, it would be impossible to hold that the liability to maintain and repair any part of the Barrier Bank had been transferred from the North Level Commissioners to the River Welland Catchment Board. The transfer can only have been made by the scheme, for the Act does not itself transfer any such liability to the Catchment Board, although it confers on the Catchment Board the sole and exclusive right to exercise the powers conferred by the Act on drainage boards so far as the main river including the banks are concerned: see s. 6 of the Land Drainage Act, 1930, to which I have already referred.

The scheme is not concerned with the transfer of powers conferred by the Land Drainage Act, 1930, and can only deal with the transfer of powers, liabilities and obligations which were immediately before the passing of the Act vested in a drainage authority. There is no mention in cl. 9 of the scheme of the banks of the main river, but only of the main river itself. The definition of the main river in s. 81 contains no direct reference to its banks, but there is an indirect reference to them in connection with "any structure or appliance "for controlling or regulating the flow of water in or out "of the channel." These structures are described as being situate in the main river or in any part of the banks thereof. By the definition, "banks" means "banks, walls, or embank-"ments adjoining or confining, or constructed for the purposes "of or in connection with, any channel or sea front, and "includes all land between the bank and low-water mark." It seems to me to be impossible on this definition to hold that the Barrier Bank, which is in some places as much as three-quarters of a mile distant from the channel of the river Welland, is a bank "adjoining" that channel. It certainly does not in any ordinary sense of the word "confine" the waters of the river Welland. This word is apt to describe the function of the natural or Fisherman's Bank. Nor can it be said to have been constructed for the purposes of and in connection with the channel of the river Welland in the same way as the Cradge Bank was constructed. The purpose for which the Barrier Bank was constructed appears plainly to have been to protect the land lying on the side of the Barrier Bank remote from the river Welland from the flood waters of the district on the side of the Barrier Bank nearer to the river. The meaning of the definition becomes clearer when its last words are considered "and includes all land "between the bank and low-water mark," for it would appear to be an abuse of language to define as a bank the flat tract of land comprising many hundreds of acres constituting the Crowland and Cowbit Washes and lying between the river and an artificial bank erected at a distance in some places of more than three-quarters of a mile from it.

The fact that the boundary of the Welland catchment area runs along the top of the Barrier Bank so that the half of that bank remote from the river Welland is excluded from the catchment area also affords cogent support to the view which I have expressed that the Barrier Bank does not fall within the definition of bank in the Land Drainage Act, 1930. In any event those responsible for the scheme cannot have contemplated the transfer of rights, liabilities and obligations in respect of any part of the Barrier Bank which lies outside the catchment area as conclusively defined by the map sealed by the Minister, for it would be ultra vires so to do.

It is further to be observed that the Land Drainage Act imposes no liabilities or obligations on the Catchment Board. If the Board has become subject to liabilities or obligations, they can only be discharged under the particular Acts of Parliament which created them and are still in force. It would, I think, be difficult to hold that the general words of the Land Drainage Act, 1930, or any scheme under it were sufficient to override the provisions of the respective Acts of Parliament which created the obligations and liabilities and imposed them on the North Level Commissioners.

In my judgment the maxim "generalia specialibus non "derogant" as explained in the case of the *Blackpool Corporation* v. *Starr Estate Co.* (1) applies, and I am satisfied that

(1) [1922] 1 A. C. 27.

the relevant provisions of the North Level Act, 1857, which imposed the obligations and liabilities to maintain and repair the portion of the Barrier Bank between Peakirk and Brotherhouse Bar on the North Level Commissioners and their predecessors in title still remain in force. In my judgment, having regard to the provisions and definitions contained in the Land Drainage Act, 1930, the North Level Commissioners are, so far as the portion of the Barrier Bank in question which is comprised in the River Welland Catchment Area, an internal drainage board of that area, and as such are liable for the maintenance and repair of it.

In the result I hold that the River Welland Catchment Board are under no liability to maintain and repair the Barrier Bank between Peakirk and Brotherhouse Bar or any part of it, and are therefore under no liability to pay any of the moneys claimed from that Board by the North Level Commissioners. I further hold that the North Level Commissioners are not entitled to any of the declarations sought in the action. The action therefore fails and must be dismissed with costs.

Solicitors: *Lee, Ockerby & Co., for Whittome & Co., Wisbech; Smith, Rundell, Dods & Bockett, for Calthrop & Leopold Harvey, Spalding.*

A. R. LL.-T.

SIMONDS
J.

1938
Jan. 18, 19;
Feb. 2.

In re RUTHERFORD'S CONVEYANCE.

GOADBY *v.* BARTLETT.

[1937. R. 1990.]

Restrictive Covenant—Sale of land subject to restrictions—No covenant to observe restrictions and conveyance not executed by purchaser—Sale of adjoining land free of restrictions—Subsequent resale with benefit of restrictions—Assignment of benefit of restrictions to assignee of purchaser by legal personal representative of vendor—No interest in the land vested in representative—Assignee not entitled to enforce restrictions.

By a contract of sale made in April, 1920, R., the owner of an estate then partly freehold but mainly copyhold, contracted to sell it to D. for 9000*l.*, of which 3000*l.* was to be paid by June 25, 1920, and the balance on June 30, 1925. In July, 1925, before this purchase had been completed, D. agreed to sell part of the land to G., subject to certain restrictions set out in the schedule to the contract.

On November 27, 1925, in pursuance of this contract R. at the request of D. conveyed the land, which was enfranchised copyhold, to G. in fee subject to these restrictions. The conveyance contained no covenant by any party to observe the restrictions, and was not executed by G.

By a subsequent deed of the same date R. conveyed the remainder of the land to D. without mention of any restrictive covenants. In 1927 D. conveyed the bulk of the land vested in him, which included a house and grounds known as Boxdale, to G. A. B. in fee, and by a deed of 1935 G. A. B. conveyed the same to the defendant in fee, and each of those conveyances contained the words in the parcels " together with the benefit of " the covenants, restrictions and stipulations contained in or " imposed by the deeds specified in Part I. of the Schedule hereto," which included the above mentioned deed of 1925.

The vendor R. having died in December, 1927, by a deed of November, 1937, his legal personal representative purported to assign to the defendant the full benefit and the fee simple of all the covenants, restrictions and stipulations contained in or to be implied from the conveyance of November 27, 1925:—

Held, (1.) that the equitable obligation which rested upon G. in respect of the land conveyed to him was not a covenant the benefit of which D. could assign to a successor in title; (2.) that there was no certainty as to the parties to any covenant or agreement implied by the restrictions, or as to the land intended to be thereby benefited; (3.) that R. having parted with the whole of the land subject to the burden, or entitled to the benefit of such a covenant, in 1925, his legal personal representative had nothing which he could effectively assign in 1937.

Held, therefore, that G. was entitled to a declaration under s. 84, sub-s. 2, of the Law of Property Act, 1925, that the land conveyed to him in 1925 was not subject to any of the restrictions contained in the schedule of the conveyance to him.

SUMMONS.

The summons was taken out by the plaintiff Sir Kenneth Goadby, under s. 84, sub-s. 2, of the Law of Property Act, asking for a declaration that the land comprised in a conveyance in fee simple to the plaintiff dated November 27, 1925, was not subject to any of the restrictions or stipulations set out in the schedule thereto.

In 1920 Sir William Watson Rutherford was the owner of land, partly freehold, but mostly copyhold, of the Manor of Walton-on-the-Hill, Surrey, including a house and grounds known as Boxdale, and on April 29, 1920, he entered into an agreement for the sale of the entire property to Captain Birt Davies for 9000*l.*, of which 900*l.* was paid on the execution of the agreement, and 2100*l.* was to be paid in June, 1920. The purchase was not to be finally completed till June 30, 1925, when the balance of 6000*l.* was to be paid.

On July 24, 1925, when this balance had not been paid, Captain Birt Davies entered into a contract with the plaintiff for the sale to him of part of the copyhold land. Up to this date the property was free from all restrictions. The agreement was expressed to be subject to the following stipulations (inter alia) set out in the schedule thereto.

"2. *Restrictions of buildings.*—No messuage or building "(except an arbour or shelter of an ornamental character to "be approved of in writing by the owner for the time being of "Boxdale) to be erected within 200 feet of the south-west "corner of Boxdale, or exceed in height 15 feet.

"3. *Use of buildings.*—No messuage or building to be used "for any purpose other than that of a private dwelling-house.

"5. *Value and class of buildings.*—No building other than an "arbour or shelter of an ornamental character except detached "private dwelling-houses of the prime cost value of 1500*l.* each "at least (exclusive of the cost of the land and of garage and "outbuildings erected in conjunction therewith) shall be erected "on the land, and not more than two such dwelling-houses."

By a conveyance also executed on November 27, 1925, after the execution of the above mentioned conveyance, reciting an agreement for sale of the property comprised in the above mentioned conveyance by Captain Birt Davies to the plaintiff, Sir William Watson Rutherford conveyed to Captain Birt Davies the rest of the land comprised in the agreement of April 29, 1920, including Boxdale. This conveyance contained no reference to any restrictions.

By a conveyance dated July 20, 1927, Captain Birt Davies conveyed part of the land conveyed to him, including Boxdale, to George Arthur Beazley in fee simple, and by a conveyance dated October 30, 1935, G. A. Beazley conveyed the same property to the defendant Fred Bartlett in fee simple. Each of these conveyances purported to assign to the purchaser the benefit of the above mentioned restrictions and stipulations.

The plaintiff desired to sell the land conveyed to him in 1925, but the prospective purchaser refused to enter into any contract to purchase the property, although otherwise willing, until it had been determined whether and to what extent the above mentioned restrictions and stipulations were binding or enforceable, and if so by whom and as to their effect. The defendant had been approached with a view to obtaining his consent to a modification of restriction No. 2, but he refused to agree to any modification thereof.

The plaintiff claimed (1.) a declaration that the land comprised in the said conveyance was not subject to any of the restrictions contained in the schedule thereto; or, in the alternative, that it might be determined (2.) whether on the true construction of the said conveyance the said restrictions precluded the erection on any part of the said land of any messuage or building exceeding 15 feet high (except an arbour or shelter of an ornamental character to be approved of in writing by the owner for the time being of Boxdale); and (3.) whether on the true construction of the said conveyance and in the events which had happened the restrictions contained in the schedule were enforceable and, if so, by whom.

After the summons in these proceedings had been taken out Sir John Hugo Rutherford, the legal personal representative of Sir William Watson Rutherford, who died in December, 1927, by a deed dated November 11, 1937, expressly assigned the benefit of the above mentioned restrictions and stipulations to the defendant.

Lionel Cohen K.C. and *C. L. Fawell* for the applicant. There is no enforceable covenant now affecting the plaintiff's land. In the conveyance to him of November 27, 1925, there was no covenant by him or any other party to observe the restrictions set out in the schedule. A covenant might be implied in equity, though not at law, but not a covenant capable of running with the land.

If a covenant is to be implied at all, the only one that could be so implied would be in favour of the vendor. The persons to benefit by the restrictions sought to be imposed are never exactly defined. Assuming a covenant in favour of the vendor Sir W. W. Rutherford, he parted with the whole of his land, with which it might run, in 1925, and since then could not enforce it. His legal personal representative is in the same position: *Chambers* v. *Randall.* (1) A covenant existing purely in equity cannot run with the land: see *Formby* v. *Barker.* (2)

Notwithstanding any express assignment of the benefit of a covenant neither the covenantee nor the assignee can enforce a covenant after the covenantee has parted with the whole of the land affected by it. The covenant must be for the benefit of ascertainable land, and here it is impossible to define the land intended to be benefited: *In re Union of London & Smith's Bank's Conveyance. Miles* v. *Easter.* (3)

There is no express covenant to observe the restrictions in the schedule entered into by either party. The result is that even if an equitable obligation were to be implied, it is left quite uncertain who is to be entitled to enforce it.

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(1) [1923] 1 Ch. 149.
(2) [1903] 2 Ch. 539, 541, 555.
(3) [1933] Ch. 611.

Harold Christie K.C. and *J. A. Reid* for the respondent. There is a covenant in equity binding on the covenantor, the benefit of which is assignable and has been assigned to the respondent: *Tulk* v. *Moxhay* (1); *Hodson* v. *Coppard.* (2)

The question is whether any party shall be permitted to use certain land in a manner contrary to that in which he has contracted to use it.

It was not the original vendor but Captain Birt Davies who subjected the land to these restrictions, and this was done originally by the agreement of June 24, 1925.

The position is different from that in *Chambers* v. *Randall* (3), where it was said that the vendor could not sell land and then assign the benefit of a covenant affecting the land. Here the land was sold together with the express benefit of the covenant.

The respondent has no need to rely on the subsequent assignment, but he had a right to go to Sir William Rutherford, or his legal personal representative, and get the assignment.

[SIMONDS J. Your difficulty is to find something in the nature of an equitable obligation binding the applicant to observe these restrictions.]

All that need be considered in equity, to create such an obligation, is what was the intention of the parties. In *Formby* v. *Barker* (4) there was no covenant, because the purchaser had not executed the conveyance made to him; but he became subject to an equitable obligation.

The covenant was clearly not a covenant in gross but was intended to benefit certain land, particularly Boxdale, as is shown by the stipulation that no building is to be erected within 200 feet of the boundary of Boxdale. Captain Davies imposed and was in a position to enforce these restrictions, and the defendant as assignee of part of the land with the benefit of the implied covenant, can equally well do so. He was the owner in equity of the defined land, which was afterwards conveyed to him in fee.

The defendant would not have paid the price which he

(1) (1848) 2 Phill. 774.
(2) (1860) 29 Beav. 4.
(3) [1923] 1 Ch. 149.
(4) [1903] 2 Ch. 539.

did pay for Boxdale if he had not relied on the annexation to the property of the benefit of this equitable obligation.

The intention is quite clear, though the parties may not have expressed it as well as they might have done. Upon the documents and facts the Court should imply a covenant in a contract to give effect to these obligations, which were really imposed by Captain Davies. He was entitled to pass the right on to any person to whom he conveyed the land, and it is submitted that he has done so.

[They also referred to *Renals* v. *Cowlishaw* (1); *Rogers* v. *Hosegood* (2); *Lord Northbourne* v. *Johnston & Son* (3); and *In re Union of London & Smith's Bank's Conveyance. Miles* v. *Easter.* (4)]

Cur. adv. vult.

1938. Feb. 2. SIMONDS J. These proceedings are taken under s. 84 of the Law of Property Act, 1925, the plaintiff, Sir Kenneth Goadby, claiming against the defendant, Fred Bartlett, a declaration that the land comprised in a certain conveyance of November 27, 1925, is not subject to any of the restrictions contained in the schedule thereto.

The facts are not in dispute. In the year 1920 Sir William Watson Rutherford was the owner of certain property at Walton-on-the-Hill in the county of Surrey. The great bulk of it was copyhold of the Manor of Walton-on-the-Hill, but two small parcels of it were freehold. The property, or at least the house on it, was known as Boxdale. In the same year he entered into an agreement dated April 29, 1920, with one Birt Davies for the sale to him of the whole property for 9000*l.*, of which 900*l.* was paid as a deposit on the signing of the agreement, 2100*l.* was to be paid on June 25, 1920, when possession of the premises was to be given to Birt Davies, and the balance of 6000*l.* was to be paid on June 30, 1925. The agreement made no provision for the purchaser entering into any restrictive covenants. The 2100*l.* was on or before

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(1) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.

(2) [1900] 2 Ch. 388.

(3) [1922] 2 Ch. 309.

(4) [1933] Ch. 611.

June 25, 1920, duly paid to Sir William Watson Rutherford, but the balance of 6000*l.* was not paid on June 30, 1925.

On July 24, 1925, Birt Davies and the plaintiff entered into an agreement for the sale and purchase for the sum of 2000*l.* of a parcel of copyhold land (being part of the land comprised in the sale from Rutherford to Davies) described as "all that piece of copyhold land situate and adjoining Boxdale "within Walton-on-the-Hill in the county of Surrey." The sale was "for an estate of inheritance . . . . according "to the custom of the Manor of Walton-on-the-Hill, in "possession free from incumbrances other than and except "the restrictive covenants mentioned in the schedule hereto "as affecting the same." The agreement further provided that, of the restrictions contained in the schedule, numbers 3, 5, 6, 7, 8, and 9 should apply to the whole Boxdale estate, and the vendor, that is, Davies, should enter into a covenant with the purchaser, that is the plaintiff, to observe and perform the same, and to include them or similar covenants in any conveyance of other parts of the Boxdale estate to any other purchaser or purchasers. The schedule contained a number of provisions, for the most part restrictive in character, though the first provision could not accurately be so described. The tenth provision was that the vendor (that is, Davies) reserved the right of allowing a departure from the foregoing stipulations in any one or more cases.

On November 27, 1925, the agreement between Davies and the plaintiff was carried out by a conveyance which contains some curious features. The parties to it were Rutherford (therein called "the vendor") of the first part, Birt Davies of the second part, and the plaintiff (therein called "the purchaser") of the third part. It recites the vendor's title, the agreement between the vendor and Birt Davies of April 29, 1920, the payment of the two sums of 900*l.* and 2100*l.*, the agreement between Birt Davies and the plaintiff of July 24, 1925, a subsequent agreement between the parties that the vendor should enfranchise the copyhold property and the consequent enfranchisement, and then witnesses that, in pursuance of the said agreements and matters thereinbefore recited and in consideration of the sum of 2000*l.* paid by the plaintiff to the vendor at the request of Birt Davies, the vendor as beneficial owner granted to the plaintiff the piece of land therein described being the land comprised in the agreement of July 24, 1925, but then enfranchised, to hold unto and to the use of the plaintiff in fee simple subject nevertheless to the restrictions and stipulations set out in the schedule thereto. The restrictions and stipulations were, so far as I have checked them, verbatim the same as those contained in the agreement of July 24, 1925. It is to be observed: (*a*) that the vendor alone conveyed and he did not purport to convey by the direction of Birt Davies; (*b*) the plaintiff, as grantee, did not enter into any covenant with any one nor in fact did he execute the deed; (*c*) Birt Davies did not enter into any such covenant as was contemplated by the agreement of July 24, 1925.

On the same November 27, 1925, by another conveyance executed later in the day with other recitals similar to those in the earlier conveyance and a recital also of that conveyance, Rutherford as vendor conveyed to Birt Davies in fee simple the remainder of the land comprised in the agreement of April 29, 1920. This conveyance made no reference to any restrictive covenants.

The rest of the history can be shortly told. On July 20, 1927, Birt Davies conveyed to one George Arthur Beazley the greater part including the residence but not the whole of the land comprised in the second conveyance of November 27, 1925. The parcels included these words: " together with the "benefit of the covenants, restrictions and stipulations "contained in or imposed by the deeds specified in Part I. of "the schedule hereto." The first deed in the schedule was the conveyance to the plaintiff of November 27, 1925. On November 30, 1935, Beazley conveyed the same property to the defendant Bartlett, the parcels containing the same words, which I have already cited. On November 11, 1937, Sir John Hugo Rutherford, the legal personal representative of the vendor Rutherford, who had died on December 3, 1927, assigned to the defendant " the full benefit of all restrictive "covenants, restrictions and stipulations mentioned in the "agreement for resale (that is, the agreement of July 24, 1925) "and the first conveyance of 1925 as to be imposed on or "as affecting the plaintiff conveyed by the first conveyance "of 1925 or to which that plaintiff is expressed to be subject "and the fee simple of all obligations and covenants on the "part of (the plaintiff) to or with the late baronet "contained in or to be implied or gathered from the "first conveyance of 1925, so far as the same are now capable "of being assigned." This last assignment was obtained by the defendant after these proceedings were begun, but I must take it into consideration in determining whether the plaintiff is entitled to the relief which he seeks.

The facts, as I have stated them, give rise to a number of questions which are not easy to solve. I have to determine, first, what was the obligation if any to which the plaintiff became subject by virtue of the conveyance of November 27, 1925, and his taking possession under that deed of the land thereby assured; and, secondly, whether the benefit of the obligation, if any, was either (*a*) annexed to the remainder of the Boxdale property and passed without express assignment to the purchaser thereof, or of any part of it, or (*b*) was assignable by Birt Davies and was assigned by him to Beazley and by the latter to the defendant, or (*c*) was assignable by Rutherford, the vendor, or his legal personal representative at the time when the latter purported to assign it.

On the first question the defendant contends that from the words of the habendum I must imply some contractual obligation on the part of the grantee. He urges that, if the grant is to the grantee to hold subject to the restrictions and stipulations contained in the schedule, and he takes possession under that grant, it is as if he had agreed with the grantor to observe those restrictions and stipulations. He can, it is conceded, be under no liability at law, for he did not execute the deed; but so also, even though there were express covenants, he would not be liable at law if he did not execute the deed; yet in equity he would be bound by them: see *Formby* v. *Barker*. (1) For his main proposition no relevant authority has been cited to me. It may well be that as between grantor and grantee in such a case the latter is bound in equity to observe the restrictions subject to which the former has granted the property to him. But it by no means follows that this equity can be stated in terms of contractual obligation so as to enable the grantor to assign the benefit of it to a successor in title. It is, in my judgment, at the most an equitable burden which cannot be forced into the legal category of covenant, just as the burden of a negative covenant, as expounded in *London and South Western Ry. Co.* v. *Gomm* (1), is an equitable burden which may be considered as arising from an extension in equity of the doctrine in *Spencer's Case* (2) or of the doctrine of negative easements, but does not as between the covenantee and a purchaser of the covenantor's estate rest on a contractual basis.

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(1) [1903] 2 Ch. 539, 547, 549, 555.

In the present case the difficulty of stating the equity in terms of contractual obligation is the greater, because I cannot state with certainty and clearness what was the contract and with whom it was made. It is clear at least that I cannot imply a covenant so framed that it will enure for the benefit of the land retained by the vendor Rutherford so as to pass to a purchaser of that land or any part of it without express assignment. It would be the merest speculation, and I have no firm ground on which I should be justified in reading into the conveyance words of covenant apt to annex the benefit of it to the land unsold or any part of it. With whom, then, am I to imply a covenant or agreement, and in what capacity? With Rutherford, or with Birt Davies, or with both of them, and the assigns of both of them? Or is the contract with Rutherford to be effective only if he does not convey the rest of the land to Davies, and with Davies to be effective only if he does? I am left in a maze of conjecture in which it does not help me to find, on looking at the stipulations themselves, that they appear to be taken sometimes for the benefit of "the owner or owners for the time being of the land "immediately adjoining"; sometimes for that of "the "owner or owners of any adjoining property"; and sometimes for that of "the owner for the time being of Boxdale," while the right of allowing a departure from the stipulations is reserved to the vendor, who is presumably Rutherford, though Davies may have been intended.

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(1) (1882) 20 Ch. D. 562, 583. (2) (1583) 5 Co. Rep. 16a.

Counsel for the defendant was, I think, inclined to argue, in the first place, that it was with Davies and his assigns that the plaintiff entered into a contractual obligation by the conveyance of November 27, 1925, and, only if that failed, to argue that it was with the vendor Rutherford and his assigns that the plaintiff contracted. To this he may have been driven by doubts as to the value of the assignment from Rutherford's legal personal representative of November 11, 1937. If he entertained such doubts, he was, in my judgment, well justified; for by November 11, 1937, Rutherford had long since parted with all property for the benefit of which on any hypothesis the stipulations were taken, and had parted with it without any reference to those stipulations. On the authority of *In re Union of London & Smith's Bank's Conveyance*; *Miles* v. *Easter* (1), where the earlier cases are examined, it seems clear that on November 11, 1937, Rutherford's legal personal representative had nothing which he could effectively assign, and that the purported assignment of that date was of no effect.

If, then, the restrictions in the schedule to the deed of November 27, 1925, are enforceable by the defendant, it can only be on the footing of an original agreement between the plaintiff and Davies and an effective assignment of the benefit of it by the latter to Beazley and by Beazley to the defendant. It was contended that I ought to infer such an agreement between the plaintiff and Davies, arising out of the conveyance, because it recited the agreement of July 24, 1925, in which the restrictions were first contained, and that agreement was between the plaintiff and Davies, and the vendor Rutherford had no part in it. But assuming that for this purpose I am entitled to look at the agreement of July 24, 1925, I find in it provisions for covenants being entered into both by the plaintiff and by Davies, and then, turning to the conveyance of November 27, 1925, I find in it covenants neither by the plaintiff with Davies nor by Davies with the plaintiff. I should be guessing at large if I were to assume that the hypothetical covenant which I am invited to read into this document was with Davies rather than with the vendor, who, after all, himself still retained the remainder of the land and would alone benefit by such a covenant if Davies did not complete his purchase.

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(1) [1933] Ch. 611.

In these circumstances I cannot safely infer a contract with Davies, the benefit of which he could assign, and it is unnecessary for me to consider the further question whether he could assign it on a sale of part only of the land for the benefit of which it must be assumed to have been given.

In the result I hold that the conveyance of November 27, 1925, did not impose any contractual obligation on the plaintiff, and, further, that, if it did, it did not impose on him a contractual obligation to Davies the benefit of which the latter could assign.

Solicitors: *White & Leonard and Nicholls & Co.; Stanley & Co.*

H. L. L.

SIMONDS J.

1938 Feb. 2.

In re INSOLE'S SETTLED ESTATE.

[1924. I. 790.]

Settlement—Settled Land—Improvements to mansion house—New range of detached buildings—Garage, workshop, engine-room and greenhouses—Not structural additions to any existing building—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 93, *Sch. III., Part II., para.* (*v.*).

The tenant for life of a settled estate erected a range of buildings, consisting of glasshouses, garages, a chauffeur's flat, engine-room, battery-room, boiler-house, workshop and potting shed at a short distance in rear of the principal house on the estate, which he was improving for the purpose of personal occupation:—

Held, that these were not "structural additions to . . . . "buildings" within para. (v.) of Part II. of Sch. III. of the Settled Land Act, 1925, and therefore not improvements the cost of which the Court could authorize to be defrayed out of capital moneys.

SUMMONS.

By his will dated April 30, 1898, the testator James Harvey Insole, having appointed executors and trustees thereof, who were to be trustees for all the purposes of the Settled Land Acts, devised his Luxborough estate in the county of Somerset upon limitations under which Eric Raymond Insole was the present tenant for life, with remainders over.

The testator died on January 20, 1901, and his will together with three codicils which are not material to the present case, was duly proved in the Principal Probate Registry on June 12, 1901, by the executors therein named.

The Luxborough estate was sold some time before 1921, and in April, 1921, the trustees out of capital moneys in their hands, part of the proceeds of the Luxborough estate, by direction of the tenant for life, purchased the Stoke Charity estate, in the county of Hants. This was an agricultural estate of 1729 acres, and included a house known as Old Stoke. The property was conveyed to the trustees to hold upon the trusts of the will.

In 1937 the tenant for life decided to take up permanent residence at Old Stoke, previously used as a shooting lodge, to alter the existing buildings and to erect new buildings in order to provide appropriate accommodation for the use of the house as a principal mansion house. The specification included various works the cost of which the trustees were satisfied could properly be allowed out of capital moneys as being for improvements within the Settled Land Act, 1925, but as to other works there was considerable doubt on the question, and the trustees took out this summons to have it determined whether the following works, namely, a range of greenhouses and a building consisting of garage, chauffeur's flat, workshop, engine-room, battery-room, tool-shed, boiler-house and potting shed, all of which were separated from the house, and at a distance of from 30 to 50 feet in rear thereof, were improvements which the trustees were authorized to pay for out of capital moneys in their hands under s. 83 and para. (v.) of Part II. of the Third Schedule to the Settled Land Act, 1925. (1) The trustees were advised by their surveyors that the works were reasonably required and would add to the letting and selling value of the land, and they were willing to allow the cost out of capital, if the Court was of opinion that they could properly do so.

G. P. Slade for the trustees.

Horace Freeman for the tenant for life in possession and tenant for life in remainder. The word "additions" means something more than the mere enlargement of an existing fabric. An addition may be an integral part of an old structure, or a separate but contiguous building, or even a non-contiguous building, e.g., a laboratory added to school buildings, but not in the same block. This is res integra, and the Settled Land Act, 1925, goes further than the earlier Acts. The question is whether the buildings are of such a nature as really to be subservient to the existing buildings. The garage, chauffeur's flat, engine-house and boiler-room are reasonably necessary to enable this country house to be occupied as a modern residence. The greenhouses may not be so necessary, but they are equally subservient. Joyce J. allowed the cost of an engine-house out of capital moneys in *In re Blagrave's Settled Estates.* (1) [He also referred to *In re Gerard's Settled Estate* (2) and *In re Leveson-Gower's Settled Estate.* (3)]

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(1) Settled Land Act, 1925, Third Schedule, Part II.: "Improvements, the Cost of which "the Trustees of the Settlement "or the Court may require to be "replaced by Instalments.

. . . .

"Para. (v.) Structural additions "to or alterations in buildings "reasonably required, whether the "buildings are intended to be let "or not, or are already let."

Evelyn Riviere for the tenant in tail supported the application.

SIMONDS J. This is an application by the trustees of the will dated April 30, 1898, of James Harvey Insole, who died on January 20, 1901, and whose will and three codicils thereto which are not material hereto were proved on June 12, 1901.

By the testator's will the Luxborough estate in the county of Somerset was originally settled; but that estate has been sold, and out of part of the proceeds of sale an estate at Stoke Charity near Micheldever in the county of Hants has been purchased and is held upon the trusts of the settlement. The estate comprises two farms, each over 800 acres in area, and a mansion house known as Old Stoke. The trustees of the settlement ask the Court to determine whether it is competent for them to expend capital moneys on certain works for the improvement of the property which are detailed in the schedule to the originating summons. These are as follows—glasshouses and a new range of buildings, including garages, chauffeur's flat, engine-room, battery-room, boiler-house, workshop and potting shed.

A ground plan of the premises has been put in evidence from which it appears that in rear of and to the north of the house there has been erected this range of buildings with the glasshouses contiguous to it at a distance of from 30 to 50 feet from the house. The question depends on the meaning which I attach to the words which occur in para. (v.) of Part II. of the Third Schedule to the Settled Land Act, 1925. Part II. deals with improvements the costs of which the trustees of the settlement or the Court may require to be replaced by instalments, and para. (v.) is "Structural additions to or alterations in "buildings reasonably required, whether the buildings are "intended to be let or not, or are already let." It is desirable to look back to Part I. of the Third Schedule, which is in two parts. Part I. includes certain works of which I should mention para. (xi.) cottages for labourers, farm servants, and artisans employed on the settled land or not, para. (xii.) farm-houses, offices, and outbuildings and other buildings for farm purposes, para. (xxi.) reconstruction, enlargement or improvement of any of the works; (xxiii.) additions to or alterations in buildings reasonably necessary or proper to enable the same to be let; and (xxv.) the rebuilding of the principal house on the settled land. Then comes Part II., dealing with improvements, the cost of which the trustees or the Court may require to be replaced by instalments. Para. (ii.) of this Part is "Any offices, "workshops . . . . any part thereof." I have not been asked to decide whether any expenditure falls under this paragraph. It is only to para. (v.) of Part II. that my judgment is directed.

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(1) [1903] 1 Ch. 560.
(2) [1893] 3 Ch. 252.
(3) [1905] 2 Ch. 95.

It was not argued before me that the works in question could be called structural alterations, but it was said that they come under "structural additions." The parties beneficially interested before me are the tenant for life in possession, the tenant for life in remainder, and the tenant in tail in remainder, and they all argue in favour of the proposed expenditure. The interests of the latter parties are, however, liable to be displaced by the issue, if any, of the tenant for life in possession, and Mr. Slade, as his duty was on behalf of the trustees, argued against the expenditure. I will assume that the works, if they are "structural "additions," are "reasonably required" within the meaning of this paragraph. But it seems to me to be a misuse of language to say that a range of buildings erected some 30 to 50 feet from the principal house is a structural addition to the house.

I am not impressed with the argument that they are subservient to the house. In my view it is impossible to regard that as a structural addition which is not according to ordinary parlance substantially part of the same structure. A range of buildings of this character at such a distance from the house

SIMONDS J.

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cannot therefore, in my judgment, constitute a structural addition to it. The contrary argument appears to involve that, if there is a building in existence and another building, which is a structure, is built, and is used in connection with it, the latter building is a structural addition to the former. If this had been intended by the Legislature, I cannot but think that apter language would have been used, and in this connection it may be observed that the improvements specifically enumerated both in Part I. and in Part II. and also in Part III. (to which no reference was made in argument) include many additional buildings which need not have been enumerated if they could be regarded as "additions" or "structural additions" under other paragraphs.

I was referred during the argument to certain authorities and particularly to *In re Blagrave's Settled Estates.* (1) In that case Joyce J. decided that he could sanction capital expenditure on an engine-house, but not on the engine and accessories necessary to complete the electric light installation for the improvement of the mansion house. The tenant for life appealed, and the decision was affirmed by the Court of Appeal; but two of their Lordships referred to the decision in Chambers allowing the cost of the engine-house (on which there was no appeal). Romer L.J. said (2): "I am bound to say that I do not quite see "how the learned judge in the Court below came to allow the "expense of the erection of the dynamo-house, seeing, as far as "I am aware, that that house was some distance from the "mansion house. It is difficult to see at first sight how it could "be said to be an addition to, or alteration in, the mansion house, "or any previously existing buildings, but that point is fortu-"nately not before us." And Cozens-Hardy L.J. (as he then was) said (2): "I entirely agree. Like Romer L.J. I at present "entertain great doubt whether the expenditure of capital "money in the construction of the dynamo-house, situate as I "understand it is, can be brought within any head of the "Settled Land Act." Having regard to the expression of those views I do not feel bound to follow the decision of Joyce J. in

(1) [1903] 1 Ch. 560.

(2) Ibid. 564.

that case. I, too, find great difficulty in understanding how he came to allow the expenditure on the engine-house.

I was also referred to two other cases: *In re Lord Gerard's Settled Estate* (1) and *In re Leveson-Gower's Settled Estate* (2); but in neither of those cases was the point which I have to decide brought before the Court. I can only decide that the works do not constitute authorized improvements within para. (v.) of Part II. of the Third Schedule to the Act, without prejudice to the question whether they or any of them come within any other paragraph of any other part.

Solicitors: *Collyer-Bristow & Co.*

(1) [1893] 3 Ch. 252. (2) [1905] 2 Ch. 95.

H. L. L.

CROSSMAN J.
1938
Jan. 13, 14, 17, 18, 19, 20.

ILLUSTRATED NEWSPAPERS, LIMITED *v.* PUBLICITY SERVICES (LONDON), LIMITED.

Passing off—Advertisements inset in periodicals—Imitation—Tendency to deceive.

The plaintiffs were the owners of certain illustrated periodicals from which they derived revenue by sale and advertisements. The defendants were an advertising agency who supplied hotels with a holder for the plaintiffs' periodicals. This holder had a special device which prevented the periodical being removed. The defendants utilized this device to insert a four page advertisement sheet at or near the middle of the particular periodical. The inset was printed and published in the same style as the periodical and was called a supplement. The plaintiffs brought this action to restrain the defendants from advertising in this fashion, namely, passing off the inset as part of their periodical:—

Held, that the act of the defendants amounted to passing off, as the public would be led to believe that the "supplement" was part of the original publication and further that damage was likely to be done to the property of the plaintiffs, namely, their goodwill in the advertising media in their periodicals. The plaintiffs, therefore, were entitled to relief by way of injunction.

WITNESS ACTION.

The plaintiffs are the publishers of six illustrated newspapers, "The Tatler," "The Sketch," "The Illustrated London "News," "The Sphere," "The Bystander" and "The Illustrated "Sporting and Dramatic News." These publications have been carried on for many years.

The plaintiffs derive revenue from these publications in two ways: first, from the sale of copies of the publications, and secondly, from the sale of advertising space in the publications. The publications are well known and widely circulated and have a high reputation. The plaintiffs have a settled policy as to their advertisements, and they lay down conditions on which they insert advertisements, and these conditions are strictly adhered to by the plaintiffs.

The defendants, who were incorporated in the year 1936, carry on business as advertising specialists.

Before the issue of the writ in this action, the defendants

[Reported by R. A. Yule, Barrister-at-Law.]

commenced an advertising scheme, in pursuance of which they sent out certain letters. The first of these was headed "Publicity Services (London) Ltd." ; it then set out the names of the directors and continued : " Advertising Contractors and "Publishers." " Dear Sirs, We now have pleasure in sub-"mitting details in confirmation of the proposition outlined "to you. We have a concession with seventy-five West End "hotels, see Rate Card, to supply them with current copies "of The Tatler, Sketch and Punch, etc., etc. Each hotel is "provided with handsome real Morocco covers bearing the "name of the hotel and the title of the respective papers "embossed in gold. These covers incorporate a special locking "device which prevents removal of the magazine by an "unauthorised person. Our Service Department, on their "weekly visit to the hotels, are responsible for the insertion "of the new paper and the removal of the old one. On "examination of our specimen cover you will see that in or "near the centre of the paper we have created a four page "advertising inset, and our offer to you is page (blank) of "this inset in (blank)." Presumably that would be the name of the paper. " Your advertisement can be printed in one, "two, three or four colours at no extra cost to you ; we bear "all printing charges, you supply blocks and lay-out only. "If you will refer again to the Rate Card, you will see that "the seventy-five hotels have a total weekly accommodation "of over 12,000, giving an annual total figure of 600,000. "Assuming that only 25 per cent. of these residents are "attracted by your advertisement, you will still secure a "Class A circulation of 150,000. The cost of a page, type "area (blank), is 3*l.* weekly and the contract is for twelve "months exhibition. A brief consideration of these figures "will, we are sure, confirm that our proposition is first-class "economic advertising for which we claim there is no equal. "All advertisers using this medium receive from us a weekly "certificate confirming that the current issue of the publication, "incorporating the advertising inset, has been delivered and "is on exhibition at the seventy-five hotels." The defendants admitted that a document A was an example of a jacket with a journal and inset as used by the defendants prior to the issue of the writ. Document A was a red Morocco cover headed " The Bystander " with the name " Hotel Splendide " below, and again below that the words " Not to be taken "away." Inside the cover was a coloured advertisement and there was a leaf, also in cardboard, inside containing two more advertisements. Then inside the cover of these two leaves was a copy of The Bystander. Any one who turned over the leaves of The Bystander, would find, first, the advertisements, then pictures and literary matter and, after an article upon films of the day, he would come upon " Supplement, Page 1," the supplement being upon the same sized sheets exactly and of the same paper. The supplement had four pages of advertisements which were fastened in, together with the rest of the copy, by a metal bar which fixed the supplement together with the rest of the newspaper, The Bystander, inside the Morocco cover. The pages were headed : "Supplement, Page 1," " Supplement, Page 2," " Supplement, "Page 3," and " Supplement, Page 4 " ; and there was at the bottom of each page the words : " This supplement is "issued and published by Publicity Services (London) Ltd., "45 High Holborn, London, W.C.1." in very small print. The four pages were four pages of advertisements, three of them being in colours and the fourth set out with different sized print and conspicuously.

The writ was issued on April 13, 1937. The endorsement of the writ as originally issued was as follows : "The plaintiffs "claim : (1.) An injunction to restrain the defendants, their "servants and agents from passing off altered copies of the "plaintiffs' periodicals as and for new and unaltered copies "issued by the plaintiffs and from doing any acts such as "would lead to any passing off as aforesaid. (2.) An enquiry "as to damages and payment," and so on ; (3.) " Delivery "up or destruction on oath of all copies ; and (4.) Costs."

The statement of claim was delivered on June 3, 1937, and clause 1 of the claiming part was in the same terms as clause 1 of the writ. Clause 2, which was not in the original, writ, claimed : " An injunction to restrain the defendants, "their servants and agents from inserting or binding into the "plaintiffs' publications matter which has not been authorised "by the plaintiffs and publicly distributing such altered "publications for the purposes of trade."

The defence was delivered on July 13, 1937. Paragraph 7 of the defence was as follows: "The defendants admit that "they have supplied to certain hotels stiff jackets intended to "hold certain journals, including 'The Tatler,' 'The Sketch' "and 'The Bystander,' in paragraph 1 of the statement of "claim mentioned, to the inside of which are affixed advertisements published by the defendants and that they have "inserted into such jackets copies of the current journals for "which such cases are respectively adapted and a further "sheet of advertisements (hereinafter referred to as 'an inset') "published by the defendants and so described. Each such "journal with the inset placed between pages near the centre "thereof has been fastened by the defendants into the jacket "by means of a locking bar. An example of a jacket with a "journal and inset as used by the defendants prior to the "issue of the writ in this action may be inspected at the office "of the defendants' solicitors marked 'A.' Immediately upon "receipt of the writ herein (which was the first intimation of "any complaint by the plaintiffs) the defendants by the "affidavit of J. W. Streeton filed herein the 16th April, 1937, "informed the plaintiffs of their intention to make certain "alterations in their practice and proceeded to alter the "wording on their insets in a manner shown on the example "which may be inspected as aforesaid marked 'B.'"

B was substantially the same as A except that in the supplement, on each side of the word "Supplement" and at the top of each page there was printed in blue ink in considerably larger type than the original blue ink at the bottom of the page in A: "This inset is published and added "by Publicity Services (London) Limited and is not a part "of the original publication."

Paragraph 11 of the defence contained the following: "The defendants hereby offer an undertaking not to put into "any journals of the plaintiffs any inset unless distinguished

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"in the manner shown in the example 'C' . . . . or some "manner not less effective and not to use the words 'sole "concessionaires' and to pay such costs (if any) as to the "Court on motion for judgment may seem fit."

C was a copy of "The Bystander." It was not the same hotel as A., otherwise the red cover was substantially the same, except that, in addition to the words "The Bystander" on the outside, there was added in gilt lettering: "Extracts "from The Bystander with added matter." The outside page of The Bystander had been taken away and a blank page had been added, on which was printed at the head: "Extracts from The Bystander with added matter." The inset had at its head: "This inset is published and added "by, and is the property of, Publicity Services (London) Ltd., "and is not a part of the original publication."

C. R. R. Romer K.C. and *G. W. Tookey* for the plaintiffs. The courts should stop this sort of activity, and the only question is whether the law is so weak as to be unable to put an end to this practice. In the first place this is a case of passing off, and owing to the inset the plaintiffs may be liable for all sorts of things. The acts of the defendants were done by way of trade, i.e., their advertisement scheme. The principle to be applied is laid down by Lord Parker in *Spalding & Brothers* v. *A. W. Gamage, Ld.* (1) People looking at the inset might think the "supplement" was our publication or authorized by us. Advertisers in our periodicals might also consider that the inset detracted from the value of their advertisements. The Court will always interfere by injunction to restrain irreparable injury being done to the plaintiffs' property: per Romer L.J. in *Samuelson* v. *Producers Distributing Co., Ld.* (2) I also rely on the judgment of Byrne J. in *Walter* v. *Ashton.* (3) An American case, *National Telephone Directory* v. *Dawson Manufacturing Co.* (4), is exactly in point. It is a judgment of an American Court, and therefore is not binding on your Lordship; but our Courts would give great weight to the opinion expressed.

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(1) (1915) 84 L. J. (Ch.) 449, 450.

(2) [1932] 1 Ch. 201, 210.

(3) [1902] 2 Ch. 282, 294, 295.

(4) (1924) 263 South West. Rep. 483.

Tookey followed. The principle in *Samuelson* v. *Producers Distributing Co., Ld.* (1) is applicable here: there has been (1.) deception or misrepresentation as to the plaintiffs' goods, (2.) for purposes of trade, and (3.) damage may be incurred. The deception is apparent: it was made for furthering the defendants' trade of advertising and damage was likely to incur to the plaintiffs' goodwill, i.e., their goodwill as an advertisement medium. We come within the principle stated by Lord Parker in *Spalding & Brothers* v. *A. W. Gamage, Ld.* (2) "Possibly, therefore, the principle ought to be "re-stated as follows: Trader A cannot, without infringing "the rights of trader B, represent goods which are not B's "goods or B's goods of a particular class or quality to be "B's goods or B's goods of that particular class or quality." This covers the present case as we are traders in competition with the defendants in their trade.

F. E. Bray K.C. and *E. Holroyd Pearce* for the defendants. The essential feature of a "passing off" action is absent in this case. It is necessary to show that not only was there a deception but also that third parties were defrauded. A person is defrauded if he loses by following the misrepresentation. Injury must be done not only to the plaintiffs but also to the public; then and then only can there be "passing off" or analogy of "passing off." Turning to the facts of the present case; first of all, jackets were already in existence, quite commonly seen in hotels and clubs, with the name of the periodical stamped on the cover. A person who asks and pays for it is entitled to get a journal of the plaintiffs, and it becomes second-hand. If a person opens the cover or jacket and finds only advertisements, my friend says this is a "passing off," because the name "Tatler" is stamped on it. There are two answers to this: (1.) He may say, I have been deceived; but he cannot say, I have been defrauded; (2.) or he may say, my first impression, before any mischief could be done, was, I thought there was something in it, but

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(1) [1932] 1 Ch. 201.

(2) 84 L. J. (Ch.) 449, 450.

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my first impression did not last long enough to have any practical effect. The intention to deceive is the question of fact in this case, and one really has to consider whether the words used are calculated to deceive and cause damage. If there is a course of conduct which will induce members of the public to change their legal position by the representation, then, if the Court comes to that conclusion, it will grant an injunction: *Singer Manufacturing Co.* v. *Wilson* (1) and *Reddaway* v. *Banham.* (2) The offer made by the defendants makes deception completely impossible: they have made every effort to avoid deception and no damage has been done to the plaintiffs.

Romer K.C. in reply. There is nothing in reason or in logic to limit the case as my friend wishes to do. In a "passing off" action it is not necessary to prove that a third party has been defrauded. As regards deception, a person would assume that the supplement was part of, say, "The Tatler," by the "get-up" and style. We have only to show when the misrepresentation arises, not when it goes. It is not necessary to prove damage if the deception be proved: the Court will assume it.

CROSSMAN J. [after setting out the facts continued:] After the case had been opened before me, counsel for the plaintiffs stated that the only question to be determined in the action was whether the defendants were justified in using document A as they used it and he asked for and obtained leave to amend his statement of claim by adding at the end of clause 2 of the claiming part the words: "in such a way "as to hold out the plaintiffs as responsible for such added "matter." The defendants' counsel thereupon asked for and obtained leave to amend their defence by striking out from paragraph 11 the words: "unless distinguished in the manner "shown in the example 'C' which may be inspected as "aforesaid or some manner not less effective" and substituting the words "without putting in reasonably prominent letters "at the head of each page the words 'This inset forms no part

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(1) (1875) 2 Ch. Div. 434, 453.

(2) [1896] A. C. 199, 210.

"'of the journal as originally published and is published and "'added by and is the property of Publicity Services (London) "'Limited, who have no connection with the publishers of the "'journal, Illustrated Newspapers' or words substantially to "the same effect." That is the way in which the pleadings now stand.

The result of an examination of document A, to which I have referred, and of the evidence which I have heard, is that I have come to the conclusion that the acts of the defendants as admitted in paragraph 7 of the defence are calculated, first, to lead the trade and the public to believe that the four page inset fastened into a copy of "The Bystander" and included in document A is part of "The Bystander" as originally published by the plaintiffs; secondly, to cause damage to the plaintiffs and, thirdly, to expose the plaintiffs to the risk of litigation.

On the first point, I attach importance to the fact that each page of the inset is headed with the word "Supplement," which seems to me to be necessarily a suggestion that it is a supplement to the original paper and not something quite separate and distinct, and also to the fact that the inset is bound up with the original publication and printed on paper of the same quality (as far as I can judge), and of the same size as the paper used in the original publication. I do not think that the words: "This supplement is issued and published by "Publicity Services (London) Ltd., 45, High Holborn, London, "W.C.1," which are printed in very small sized print at the bottom of each page of the inset, is sufficient to counteract the effect of the other facts which I have mentioned pointing in the other direction.

On the second point I find on the evidence that, as a result of the defendants' acts, the plaintiffs' publication will be a less attractive publication to the reading public and also a less attractive medium for advertisers and that it is likely that advertisers will be offended and will go to the defendants for their advertisements instead of to the plaintiffs. Those are results which I think may flow from what the defendants have done.

On the third point I find on the evidence that the plaintiffs may well be thought to be responsible for the inset and that they run a reasonable risk of being exposed to litigation—not successful litigation, but litigation which may none the less be very annoying and possibly cause them considerable expense.

The plaintiffs in the claim which they have made rely on the law of passing off as expounded by Lord Parker of Waddington in the case of *Spalding & Brothers* v. *A. W. Gamage, Ld.* (1) and as expounded by the Court of Appeal in the case of *Samuelson* v. *Producers' Distributing Co., Ld.* (2) The plaintiffs say that it appears from these cases that a right of action by A against B arises if B makes a misrepresentation as to A's goods for trading purposes and such misrepresentation gives rise to a probability of damage to A.

Mr. Bray, in his very able argument for the defendants in this case, contended that the authorities did not justify the statement of the law contended for by the plaintiffs. His contention, as I understand it, was that a right of action for passing off does not arise unless some third party is deceived. He says that Lord Halsbury's statement of the law in *Reddaway* v. *Banham* (3), which was adopted by Lord Parker of Waddington in *Spalding & Brothers* v. *A. W. Gamage, Ld.* (1) must be qualified, not only by limiting it to representations for trading purposes, but also by limiting it to cases where some person will be deceived. He says that in the present case there is no person who will deal with the defendants in the mistaken view that he is dealing with the plaintiffs and that one of the essential elements of a passing off action is wanting in this case.

I think, however, that the plaintiffs' right of action depends upon the injury caused to their property (that is, their goodwill in their advertising media) by the defendants' misrepresentation.

I think that it is sufficient for the purpose of this action to hold, as I do, that if a person represents his goods as the goods of another for trading purposes and damage to the other person

(1) 84 L. J. (Ch.) 449.
(2) [1932] 1 Ch. 201.
(3) [1896] A. C. 189, 204.

is likely to result therefrom, the other person has the right to stop the first person from doing this. I find in this case that the defendants by their acts prior to the issue of the writ represented (and here I do not suggest that when they did so they did any deliberate and wrongful act knowing it to be wrong), for trading purposes their advertising media, that is to say, their copies of the plaintiffs' publications together with the defendants' insets, as being the plaintiffs' original publications, and that damage to the plaintiffs was likely to result from such misrepresentation, and accordingly the plaintiffs were, in my judgment, entitled at the time of the issue of the writ to an injunction in the form claimed by clause 1 of the claiming part of the statement of claim with the alteration of the words "passing off" in the second line to "representing," the addition of the words "for trading purposes" after the word "representing," the omission of the words "new and" in the third line and the substitution of the word "representation" for "passing "off" in the fourth line, that is to say, an injunction restraining the defendants "from representing for trading purposes altered "copies of the plaintiffs' publications as and for unaltered "copies issued by the plaintiffs and from doing any acts such "as would lead to any representation as aforesaid." I do not think that the plaintiffs were in any event entitled to an injunction in the form originally claimed in clause 2 of the claiming part of the statement of claim, as this would apply even if the defendants made it perfectly clear that the insets were not part of the plaintiffs' publications and that the plaintiffs were not in any way responsible for them. The plaintiffs at the opening of their case claimed that they were entitled to an injunction in the form claimed in clause 2 as amended, relying on the decision in *Walter* v. *Ashton*. (1) I understand, however, that the plaintiffs are now satisfied that an injunction in the form claimed in clause 1 with the alterations which I have mentioned gives them all the protection that they require, so that it is not necessary for me to decide whether they are entitled to an injunction in the form claimed in clause 2 as amended.

(1) [1902] 2 Ch. 282.

It is contended on behalf of the defendants that what the defendants have done since the issue of the writ disentitles the plaintiffs to any injunction, because the defendants have in effect offered to give the plaintiffs all that they require. I think that, if they had done that, the position might be very different. I think the position is correctly stated in the Annual Practice, 1938, p. 933, that " A plaintiff "is entitled to apply for an injunction and to have his costs "as soon as his legal right is invaded, although unintentionally ; and he is under no obligation to give the defendant "any notice before commencing an action ; he is entitled to "an injunction, unless before writ there has been an entire "abandonment of that which constituted the plaintiffs' "demand, or unless the defendant has given him everything "he did or could ask for by suit." I think that represents the position, as a matter of practice at any rate. I do not feel in this case that I can deprive the plaintiffs now of the relief for which they ask because of the suggestions and offers which the defendants made, no doubt with the best intentions, as soon as the writ was issued. I do not think that the defendants have ever offered the plaintiffs what they were, in my judgment, entitled to ; but the question still arises whether, in view of what the defendants offered, I ought actually to grant an injunction to the plaintiffs, and whether I ought not to endeavour to frame some order which shows precisely what it is that the defendants are entitled to do. I have considered that anxiously, because I am anxious not to prolong litigation or to extend it more than is necessary ; but it seems to me that I should not be doing right and acting fairly to the plaintiffs now if I insisted upon limiting their injunction to something which precisely sets out what the defendants might do in this particular case. I think that the plaintiffs are entitled to an injunction in general terms and that it is for the defendants to consider when they come to do any particular acts whether they come within those terms or whether they are outside the restriction put upon them by the injunction.

I think, therefore, that I ought and am bound in the circumstances of this case to grant an injunction in the modified terms of clause 1 of the claiming part of the statement of claim. As regards clause 2, I take it that the plaintiffs now do not ask for any order in the circumstances. As regards clause 3 I do not know whether the plaintiffs ask for an inquiry as to damages.

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Romer K.C. I think perhaps we had better take it, my Lord. The costs will be reserved, I suppose.

CROSSMAN J. I shall have to reserve the costs of the inquiry. You do not ask for delivery up?

Romer K.C. No.

Jan. 20. His Lordship, after hearing argument, ordered the defendants to pay four-fifths of the plaintiffs' costs of the action.

Solicitors: *Nicholson, Graham & Jones*; *Wingfields, Halse & Trustram.*

R. A. Y.

SIMONDS J.

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Feb. 10, 23.

TYSER *v.* ATTORNEY-GENERAL.

[1937. T. 1885.]

Revenue—Estate Duty—Disposition by will of works of art—Exemption while enjoyed in specie—Duty chargeable on proceeds of sale—Whether gross or net proceeds—Finance Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 40.

Where works of art or any other objects of national, scientific, historic or artistic interest within s. 40 of the Finance Act, 1930, passing on the death of any person, are exempt from death duties while enjoyed in kind, and are subsequently sold, the estate and other death duties, which then become chargeable on the proceeds of sale, are to be charged not on the gross proceeds of sale, but on the net proceeds, after deduction of commission and all other expenses incurred in selling the property to the best advantage.

SUMMONS.

The testator, Henry Oppenheimer, by his will dated February 4, 1931, appointed his wife, Clara Eugenie Oppenheimer, Granville Tyser, Sir Max Julius Bonn and Sir Alan Ree Smith executors and trustees thereof, and by clause 3 bequeathed all his pictures (with one exception) drawings, mezzotints, engravings, etchings, woodcuts, prints and other like articles, antique jewels, medals, coins, ivories, statuary and other works of art to his trustees upon trust, if and so long as they should in their uncontrolled discretion think fit, to lend the same or any part thereof to his wife or to any exhibitions, museums or similar institutions, and, subject thereto, and subject also as to certain specific items to the trusts therein mentioned, the collection was to fall into and form part of his residuary estate.

The testator died on March 23, 1932, and his said will was duly proved on May 11, 1932, by the executors therein named.

The collection of works of art belonging to the testator was of great value and historic interest, and on his death exemption was claimed from death duties for it and was allowed.

The testator's widow died on March 12, 1936, and after her death the trustees, after taking expert advice, decided to sell the collection. The total gross proceeds of sale amounted to 140,475*l*. 18*s*. and the expenses necessarily incurred to sell the collection and to obtain the best prices therefor amounted to 13,182*l*. 16*s*. 6*d*. The estate duty payable in respect of the testator's estate was at the rate of 24 per cent. The Treasury claimed that under s. 40, sub-s. 2, of the Finance Act, 1930, the death duties which became payable on the sale of the collection were payable on the gross proceeds of sale, while the trustees claimed that duty was payable only on the net proceeds of sale, after deduction of all expenses including the commission. The summons was taken out for the determination of the question.

Wilfrid Hunt for the plaintiff. The "proceeds of sale" referred to in s. 40 of the Act (1) upon which estate duty has become chargeable are the net proceeds of sale which ultimately reach the beneficiary, after deduction of all expenses incurred in obtaining the price realized.

J. H. Stamp for the defendant. The "proceeds of sale" here means the total of the prices realized at the sale. The

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(1) The Finance Act, 1930 (20 & 21 Geo. 5, c. 28), s. 40, provides: "(1.) Where there pass on "the death of a person dying after "the commencement of this Act "any objects to which this section "applies, the value of those "objects shall not be taken into "account for the purpose of esti-"mating the principal value of the "estate passing on the death or "the rate at which estate duty is "chargeable thereon, and those "objects shall, while enjoyed in "kind, be exempt from death "duties.

"(2.) In the event of the sale of "any objects to which this section "applies, death duties shall, sub-"ject as hereinafter provided, "become chargeable on the pro-"ceeds of sale in respect of the "last death on which the objects "passed and, as respects estate "duty, at the rate appropriate to "the principal value of the estate "passing on that death upon "which estate duty is leviable, and "with which the objects would "have been aggregated if they had "not been objects to which this "section applies, and the person "by whom or for whose benefit "the objects were sold shall be "accountable for the duties and "shall deliver an account for the "purposes thereof within one "month after the sale.

. . . .

"(3.) The objects to which this "section applies are such pictures, "prints, books, manuscripts, "works of art, scientific collec-"tions or other things not yielding "income as on a claim being made "to the Treasury under this "section appear to them to be of "national, scientific, historic or "artistic interest."

Act for the first time substitutes "proceeds of sale" for "hypothetical value," the expression used in previous Acts dealing with the exemption of works of art from death duties. Where the intention is to tax the net proceeds, the Legislature has said so in express words: see Finance (1909–10) Act, 1910, s. 61, sub-s. 5, and Finance Act, 1912, s. 9—"the "net moneys (if any) after deducting all necessary outgoings "since the death of the deceased, which may from time to "time be received from the sale of timber trees or wood when "felled." Therefore "proceeds of sale" must mean all the proceeds without any deduction, while "net moneys" or "net proceeds" implies a deduction of expenses.

See also the Bankruptcy Act, 1869, s. 87, where the words "proceeds of sale" mean the total amount to be retained by the sheriff; for the deduction of expenses is referred to later on in the section. And see Seton on Decrees, vol. i., p. 324, where the words are used in a form of order for sale by the Court.

Wilfrid Hunt replied.

Cur. adv. vult.

Feb. 23. SIMONDS J. This case raises a novel point as to the estate duty payable on the sale of chattels for which, upon the death of their former owner, exemption from death duties was successfully claimed upon the ground of their national, scientific, historic or artistic interest.

The facts are as follows. Henry Oppenheimer died on March 23, 1932, possessed of a very valuable collection of drawings, ivories, statuary and other works of art of every description. By his will, which was made on February 4, 1931, he authorized his trustees in their absolute discretion to lend his collection or any part of it to his wife, or any exhibitions, museums, or similar institutions, and subject thereto directed that it should fall into and form part of his residuary estate. Upon his death exemption from death duties in respect of the collection was successfully claimed under s. 40 of the Finance Act of 1930. The testator's widow survived him, and died on March 12, 1936. Until her death the trustees exercised the authority to which I have referred, and during this period the collection was accordingly enjoyed in kind. But upon her death it became necessary to sell it. The trustees took the best expert advice they could get as to the best method of sale, and sold the whole collection with a few small exceptions. What are described as the gross proceeds of sale amounted to 140,475*l.* 18*s.*, and what are described as the expenses in connection with the sale amounted to 13,182*l.* 16*s.* 6*d.* It is alleged without contradiction, and I believe, that it was necessary to incur such expenses in order to sell the collection to the best advantage. By far the largest item is the commission of 7½ per cent. on the gross proceeds of sale paid to the auctioneers, which amounted to over 10,000*l.*

In these circumstances the Attorney-General claims that estate duty is now payable upon the sum of 140,475*l.* 18*s.*, while the trustees claim that it is payable upon that sum less the sum of 13,182*l.* 16*s.* 6*d.* The duty payable being at the high rate of 24 per cent., a sum of no less than 3144*l.* is at stake.

Before I further consider s. 40 of the Finance Act, 1930, the correct interpretation of which is immediately under discussion, I must look back to the earlier legislation. Sect. 7, sub-s. 5, of the Finance Act of 1894 provides that the principal value of any property (i.e., of any property passing on the death in respect of which duty is exigible) shall be estimated to be the price which in the opinion of the Commissioners such property would fetch if sold in the open market at the time of the death of the deceased. This provision applied to works of art as to other kinds of property. A limited exemption was given by s. 15, sub-s. 2, of the same Act, which provided that it should be lawful for the Treasury to remit the duty in respect of any such pictures, etc., as appeared to the Treasury to be of national, scientific or historic interest, and to be given for national purposes or to any university or otherwise as therein mentioned.

A wide exemption was given by s. 20 of the Finance Act, 1896, which is the forerunner of the section I have to interpret.

That section provided, by sub-s. 1: "Where any property "passing on the death of a deceased person consists of such "pictures, prints, books, manuscripts, works of art, "scientific collections, or other things not yielding income "as appear to the Treasury to be of national, scientific, or "historic interest, and is settled so as to be enjoyed in kind "in succession by different persons, such property shall not, "on the death of such deceased person, be aggregated with "other property, but shall form an estate by itself, and, "while enjoyed in kind by a person not competent to dispose "of the same, be exempt from estate duty, but if it is sold "or is in the possession of some person who is then competent "to dispose of the same, shall become liable to estate duty," and by sub-s. 2 it provided that: "The person selling "the same, or for whose benefit the same is sold, and also "the person being in possession and competent to dispose "of the same, shall be accountable for the duty, and shall "deliver an account, in accordance with section eight of the "principal Act," within the time specified.

Upon a reference back to s. 8 of the principal Act I find nothing which helps me to a solution of the present question. It is to be observed that the words "proceeds of sale" do not occur in s. 20 of the 1896 Act. Still further exemption was given by the Finance (1909–1910) Act, 1910, by s. 96, by which it was in effect provided that absolute owners should be placed in the same position as limited owners, so that in any case duty was exigible only upon a sale. So the law remained until 1930. The position therefore was that from 1894 to 1896 duty was payable upon the hypothetical market price of the chattels, unless exemption was conceded, while from 1896 to 1910 the same provision applied except where the chattels were settled so as to be enjoyed in kind in succession by different persons, but in such cases it was only upon a limited owner effecting a sale or a person becoming entitled in possession and competent to dispose that an account had to be delivered. It is somewhat obscure, and fortunately I have not to decide what form the account should have taken. It may well be that the value of the chattel, even where it was sold, was still for the purpose of duty taken to be the hypothetical market price at the date of the death of the deceased. No other test of value appears to be provided. Then from 1910 to 1930, whether or not chattels were settled, if they satisfied the Treasury test, duty was payable only upon a sale. Upon that event an account had to be delivered and still, so far as I have been able to ascertain, no other test than the hypothetical market price was provided.

In this state of the law s. 40 of the Finance Act of 1930 was passed, and it was thereby provided by sub-s. 1 that: "Where there pass on the death of a person dying after "the commencement of this Act any objects to which this "section applies, the value of those objects shall not be taken "into account for the purpose of estimating the principal "value of the estate passing on the death or the rate at "which estate duty is chargeable thereon, and those objects "shall, while enjoyed in kind, be exempt from death duties," and by sub-s. 2: "In the event of the sale of any objects to "which this section applies, death duties shall, subject as "hereinafter provided, become chargeable on the proceeds "of sale in respect of the last death on which the objects "passed and, as respects estate duty, at the rate appropriate "to the principal value of the estate passing on that death "upon which estate duty is leviable, and with which the "objects would have been aggregated if they had not been "objects to which this section applies, and the person by "whom or for whose benefit the objects were sold shall be "accountable for the duties and shall deliver an account "for the purposes thereof within one month after the sale." Then there is a proviso which is not relevant to the present purpose, and then there is a definition of the objects to which the section applies which covers the present case. Thus, this section for the first time introduced "proceeds of sale" as the measure of liability in the case of such chattels. The same expression is used in s. 22, sub-s. 1 (*f*), of the Finance Act, 1894, but the context is such that I do not derive any assistance from its use. In s. 9 of the Finance Act, 1912, which deals with timber, I find an expression "net moneys "(if any), after deducting all necessary outgoings since the "death of the deceased, which may from time to time be "received from the sale of the timber," but though the policy of the Legislature in regard to duty on timber affords some slight analogy to that in regard to works of art, I do not think I can get any assistance towards the interpretation of s. 40 of the Act of 1930 by a consideration of s. 9 of the Act of 1912.

I was referred also to the Bankruptcy Act of 1869, s. 87, where the expression "proceeds of sale" is used, and to forms of orders where the same or similar expressions are commonly used; but the result was less to elucidate the section I have to consider than to suggest that there may be other problems in other fields.

As a result of considering the earlier legislation I am left with no more help than this, that in dealing with this subject-matter the Legislature has thought fit to substitute for a hypothetical price resting on the opinion of the Commissioners the certain test of actual sale.

What then are "the proceeds of sale" upon which duty must be levied? In my judgment they are the proceeds of sale which reach the vendor or any person on his behalf and for his use after payment of the proper expenses of sale. To take what is the largest item of deduction from the gross proceeds of sale, the sum of over 10,000*l.* paid to or retained by the auctioneers as their commission upon sale, I can see no justification for regarding this as a taxable subject. For the purpose of a taxing Act it must I think be right to regard that only as a proper subject of taxation which in fact represents the value of his property to the man who is taxed. As I see the purpose and scheme of this legislation it is to impose a tax upon property which passes on a man's death and to determine the quantum of the tax by reference to the value of the property, i.e., the value of the property to him. If the value is ascertained by reference to a sale, it is, as it appears to me, beside the mark to ask what would the value of the property be to him upon a sale if he had the fruits of a sale but not its expenses; and it is, I think, particularly unreasonable to regard the gross proceeds of sale as the value to him of his property if those gross proceeds are only reached, as here they are, by a substantial expenditure, and in effect to tax the subject in respect of a sum expended no less for the benefit of the Crown than of the subject.

It was urged upon me by counsel for the Attorney-General that the proceeds of sale and the price paid must mean one and the same thing, the difference of expression arising from the different angle of view, that of the vendor or purchaser. This cannot in my judgment be generally true, for it would be easy so to arrange the method of sale, for example by placing the articles in the hands of an agent for sale upon the terms that he should account for a portion only of the proceeds to the owner, that it would be quite impossible to identify the price paid by the purchaser with the proceeds which reach the former owner. In substance there is no real difference between such a case and the present, where the auctioneers receive their commission for their labours. In neither case is the price paid by the purchaser the same thing as the proceeds of sale received by the vendor.

I see no difficulty as a matter of construction in holding that in s. 40 of the Finance Act of 1930 the expression "proceeds of sale" means the net proceeds of sale, i.e., the proceeds after deducting the expenses of that sale, and I so hold and declare accordingly.

Solicitors: *Linklaters & Paines; The Treasury Solicitor.*

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[1934. P. 858.]

Ecclesiastical Law—Church in Wales—Incumbent's right to annuity arising out of tithe rentcharge—Emoluments of office—Institution of incumbent to another parish—Income derived from trust under will for incumbent for time being of latter parish—Person holding an ecclesiastical office in Church in Wales—Representative body of the Church in Wales—Whether possessing statutory powers to deduct income derived under will from annuity—Commutation of existing interests—Welsh Church Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *s.* 8, *sub-s.* 2; *ss.* 14, 15, *and* 18—*Welsh Church* (*Temporalities*) *Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 65), *ss.* 2, 3.

The plaintiff was at the date of the coming into force of the Welsh Church Act, 1914, rector of the parish of C. in the county of Glamorgan. The emoluments of his office included tithe rentcharge and an annual sum derived from the redemption of tithe rentcharge amounting to the total annual sum of 528*l.* 13*s.* 6*d.* In 1933 the plaintiff resigned the rectory of C. on being instituted as vicar of another parish—namely, P., the incumbent of which was entitled under the will of one N., who died in 1917, to the perpetual annual income derived from the investment of a legacy thereby bequeathed to the vicar for the time being. The income amounted to the sum of about 243*l.* a year.

By his statement of claim the plaintiff claimed a declaration that, so long as he held the office of vicar of P. or any other ecclesiastical office in the Church in Wales, he was entitled to the full sum of 528*l.* 13*s.* 6*d.*, and that the defendants were not entitled—so long as he held the office of vicar of P.—to deduct from the said annuity the amount of the income to which he, as incumbent of the parish of P., was entitled under the trusts of N.'s will. The defendants claimed that the plaintiff was only entitled to the annual sum of 528*l.* 13*s.* 6*d.*, and that he must bring into account the amount of the said income payable to him as incumbent of P. in respect of the legacy under N.'s will:—

Held, on the facts, that the plaintiff had accepted the living of P. on the terms of being paid the same stipend as he had received for the living of C.

Held, also, on the construction of the Welsh Church Act, 1914, that, although the commutation effected by s. 18 of the Act had the result of rendering inapplicable the provisions of s. 8, sub-s. 2, relating to the existing interests of ecclesiastical offices and also the provisions of s. 15 and that part of s. 14 which dealt with the preservation and duration of existing interests against the transferees of alienated property, nevertheless it did not render inapplicable the proviso to s. 14, sub-s. 1, which, although in form a proviso, was in effect a substantive enactment imposing upon the holder of the office, upon such transfer, the obligation to pay over the whole of the net income of the original office, and, as such proviso applied to all tithe rentcharges, it followed that it applied to the annuity which the plaintiff claimed.

Held, therefore, that the plaintiff was only entitled to receive so much of his annuity of 528*l*. 13*s*. 6*d*. as with the 243*l*. arising from the N. bequest would make up the 528*l*. 13*s*. 6*d*.

Decision of Luxmoore J. [1937] Ch. 250 reversed.

APPEAL by the defendants from a decision of Luxmoore J.(1)

On September 18, 1914, the day on which the Welsh Church Act, 1914, was passed, the plaintiff held the office of rector of the parish of Coity with Nolton Chapel, in the county of Glamorgan. The emoluments of the office at that date included, among other things, tithe rentcharge to the total annual value of 520*l*. 4*s*. 1*d*. and an annual sum of 8*l*. 9*s*. 5*d*. derived from investments representing the proceeds of redemption of tithe rentcharge effected before that date. The plaintiff continued to hold the office of rector of Coity with Nolton Chapel until his resignation on July 2, 1933. On July 3, 1933, he was instituted and inducted to the office of vicar of Penmark.

On April 18, 1934, the plaintiff commenced this action against the Representative Body of the Church in Wales, a corporation incorporated by Royal Charter under the provisions of the Welsh Church Act, 1914. The relief claimed was a declaration that the plaintiff was entitled to have paid to him by the defendants an annuity of 528*l*. 13*s*. 6*d*. so long as he held the office of vicar of Penmark or any other ecclesiastical office in the Church in Wales, and that so long as he held the office of vicar of Penmark the defendants were not entitled to deduct from the annuity of 528*l*. 13*s*. 6*d*. any sum payable to him under the trusts declared by the will of a Dr. George Neale, who died on September 15, 1917. Dr. Neale had by his will bequeathed a legacy of 6000*l*. upon trust for investment and payment of the income in perpetuity to the incumbent for the time being of the parish of Penmark. At the date of the plaintiff's institution and induction as vicar of Penmark this legacy was represented by a sum of 4866*l*. 17*s*. 2*d*. 3 per cent. Conversion Stock standing in the name of the Official Trustee of Charity Funds.

The defendants claimed that the plaintiff was only entitled

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to receive while he was vicar of Penmark a total annual sum of 528*l*. 13*s*. 6*d*., and must bring into account the income he received from Dr. Neale's bequest.

The annuity of 528*l*. 13*s*. 6*d*. was payable under the provisions of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919, relating to the computation of what were described in the first named Act as "the existing interests of holders of ecclesiastical offices in "the Church in Wales" in certain classes of property defined in that Act. The particular class of property in the present case was tithe rentcharge and all payments in lieu of or in the nature of tithes or tithe rentcharge.

The defendants alleged that the plaintiff on his induction to the office of vicar of Penmark on July 3, 1933, signed a declaration that he consented to be bound by all the canons of the Church in Wales and all the rules and regulations of the Governing Body of the Church in Wales, and that the plaintiff when signing the declaration was aware of the rules and regulations, and that, as vicar of Penmark, he would be entitled only to the annuity as being greater in amount than the stipend of that office, as represented by the income of the Neale bequest, and an annual sum of 50*l*. allocated to the office out of general church funds.

The defendants also alleged that before the plaintiff's institution to the living of Penmark an arrangement to the same effect as the declaration was made between him and the defendants.

Luxmoore J. held that, on the true construction of the Welsh Church Act, 1914, as amended by the Welsh Church (Temporalities) Act, 1919, the provisions of s. 18 of the Act of 1914 constituted a separate code fixing the rights and interests of persons entitled to existing interests on September 18, 1914, in the particular event of the commutation of the whole of those existing interests; and that the plaintiff was entitled to be paid the annuity claimed so long as he held an ecclesiastical office in the Church in Wales.

The defendants appealed. The appeal was heard on January 13 and 14, 1938.

Sir William Jowitt K.C., W. N. Stable K.C., and *F. H. L. Errington* for the applicants. The question is whether the plaintiff on becoming vicar of Penmark was entitled to the annual sum arising under Dr. Neale's bequest as well as the sum of 528*l.* payable to him under the Welsh Church Act, 1914. In this connection two questions arise: (1.) whether any special arrangement was made with regard to this on the plaintiff's appointment to be vicar of Penmark; and (2.) if not, what is the right position under the Act?

The scheme of the Act was to provide for disestablishment of the Church in Wales and for the determination of certain rights. This applied in particular to tithe rentcharge enjoyed by the Church before 1662. The existing interests of beneficed clergy were, however, strictly preserved, and 520*l.* out of the sum of 528*l.* was paid in respect of such rentcharge and 8*l.* in respect of interest on a sum provided for redemption of rentcharge. These were paid under the Act to the plaintiff by reason of his being rector of Coity, Glamorgan, when the Act came into force on March 31, 1920, by virtue of the Welsh Church (Temporalities) Act, 1919.

The arrangement is said to have been made at an interview between the plaintiff and Mr. Morgan, who was then secretary of the Representative Body of the Church in Wales. That body had adopted the practice of paying to an incumbent with a vested interest under the Acts, who was appointed to another living, either his vested interest or the emoluments in respect of the new living, whichever was the larger. It is inconceivable that Mr. Morgan did not tell the plaintiff of this practice at a meeting arranged to inform the plaintiff as to his position in regard to the vested interest of 528*l.* if he changed his living. Mr. Morgan is dead, and the plaintiff was not called as a witness; but the subsequent correspondence and in particular the plaintiff's own letters make it clear that he realized the position and accepted the benefice of Penmark on that footing.

If this contention is not accepted, it remains to consider the position under the Welsh Church Act, 1914. Sect. 1 provides for the disestablishment of the Church in Wales, and

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by s. 3 the ecclesiastical law ceases to apply in law and becomes a matter of contract. Sect. 4 provides for the vesting in the Welsh Commissioners as from the date of disestablishment of all Welsh ecclesiastical property vested in the Ecclesiastical Commission or Queen Anne's Bounty and of all other property which at the time of the passing of the Act belonged to or was appropriated to the use of any ecclesiastical office in the Church of Wales. Sect. 7 defines private benefactions as any property which consists of or is derived from property given by any person since 1662 and money given by private subscription or voluntarily since that date. Then s. 8 deals with the distribution of the property of the Welsh Commissioners and sub-s. 1 (*a*) provides for the transfer to the Representative Body (constituted by s. 13) of (amongst other things) all private benefactions; while sub-s. 1 (*c*) provides that out of property not transferred by sub-s. 1 (*a*) tithe rentcharge formerly appropriated to the use of any parochial benefice is to be transferred to the council of the county in which the land out of which the tithe rentcharge issues is situated. This then applies to tithe rentcharge to which the title arose before 1662. Sects. 14, 15 and 18 are the important provisions. Sect. 14, sub-s. 1, provides that any person who at the passing of the Act held an ecclesiastical office affected by the Act by freehold tenure or any tenure equivalent thereto shall retain his existing interests in the emoluments of that office " so long as he holds "that office or any other ecclesiastical office in the Church "in Wales to which he may be nominated or appointed after "the passing of this Act"; but there is a proviso that when appointed to a new office " he shall (save as otherwise expressly "provided by this Act) pay over the net income of the "ecclesiastical office held by him at the passing of this Act "to the representative body." By s. 14, sub-s. 2, the payment determines on such a person ceasing to hold an office for six months. Sect. 15 provides by sub-s. 1 that "There shall be paid to each person who has any existing "interest in any tithe rentcharge transferred to a county "council under this Act," in substitution for that interest and so long as that interest would otherwise have continued "the annual amount . . . . of that tithe rentcharge" the amount being by sub-s. 2 paid half-yearly by the county council to the Representative Body upon trust to pay it over to the person who had such an existing interest. To avoid the inconvenience of the county council having to make these half-yearly payments s. 18 of the Act as amended by s. 3 of the Welsh Church (Temporalities) Act, 1919, provided for commutation by payment of a lump sum to the Representative Body. Thus s. 18 (*a*) provides that as from the date of disestablishment the existing interests of the holders of ecclesiastical offices in all property (other than burial grounds) vested in the Welsh Commissioners and by them transferred to the county councils or the University of Wales shall determine, and goes on to say that "the provisions of "this Act respecting existing interests in such property, and "the payment of money in substitution for and in satisfaction "of such interests . . . . shall cease to have effect." These provisions are s. 8, sub-s. 2, and s. 26. It is contended on the other side, however, that s. 14 also ceased to have effect, and Luxmoore J. so held. Then s. 18 (*b*) provides for the payment by the Welsh Commissioners to the Representative Body of the aggregate value of the existing interests of holders of ecclesiastical offices in the Church in Wales. Sect. 18 (*e*) and (*f*) are of great importance. Sect. 18 (*e*) provides that the holder of any ecclesiastical office in the Church in Wales by freehold tenure or an equivalent tenure shall "subject to any arrangements which may be made between "him and the representative body, be entitled, in lieu of "his existing interest in such property as aforesaid, to an "annuity calculated in manner provided by the Fifth Schedule "to this Act, so long as he continues to hold an ecclesiastical "office in the Church in Wales." Sect. 18 (*f*) charges every annuity payable under this section on property in the hands of the representative body and provides that it shall "be "treated as part of the emoluments of the ecclesiastical office "which the annuitant held at the passing of this Act" and it goes on to protect incumbrancers. This provision treating

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the annuity as "emoluments of the ecclesiastical office" refers back to s. 14, and, it is contended, makes s. 14, sub-s. 1 (*a*), applicable. The view taken by Luxmoore J. that s. 18 is a code by itself cannot stand. There is no reason why ancient and modern tithe rentcharges should stand on a different footing so far as regards the rights of the holder of an ecclesiastical office. Sect. 14 is dealing with the emoluments of an ecclesiastical office and s. 18 with property rights, but all are subject to the same principle. The arguments advanced on the other side were that the application of s. 14 was excluded by s. 18 (*a*) and that s. 18 (*e*) determined the rights of the plaintiff in the present case. Indeed the matter was put higher and it was said that s. 18 was a code by itself, so that all the rest of the Act must be ignored. If this contention prevailed, it would have very serious effects, for the provisions as to pensions in s. 14, sub-ss. 2 and 7, would be inapplicable, and there would be no right to pension beyond that to be inferred from s. 18 (*f*) and (*h*), so that matters of pension would be left at large. Further in the absence of s. 14, sub-s. 2, no period of six months would be allowed after a person ceased to hold an ecclesiastical office before the vested office would cease, and the gap of a day here between the tenure of the two livings might suffice to determine the annuity. On all these grounds the annuity of 528*l.* had to be paid over to the Representative Body by the plaintiff as soon as he ceased to be rector of Coity. Under the proviso to s. 14, sub-s. 1, the Representative Body was free to adopt such practice as it thought desirable.

Harold Christie K.C., *R. Gwyn Rees*, and *G. Granville Slack* for the respondent. The Court is being asked to infer a binding agreement on the part of the respondent to forego the right which he would otherwise have, for nothing less would deprive him of his legal rights. Further by the pleadings the agreement is alleged to have been made at the interview with Mr. Morgan, and it is not open to the appellants to say that the respondent was only informed at the interview of the terms on which he would change his office and agreed to these terms subsequently by accepting the new living. At the most the agreement at the interview must be conditional on accepting the benefice of Penmark. The whole correspondence indicates that no such agreement was come to.

The position under the Welsh Church Act, 1914, it is submitted, is this. We rely on the provisions of s. 18 of the Act in support of the plaintiff's claim. Sect. 14 certainly does not apply to the plaintiff's case, for in order to make s. 14 effective it is necessary that s. 8, sub-s. 2, should apply to the case, for the provisions of s. 14 only apply to cases governed by s. 8, sub-s. 2. Sect. 8, sub-s. 2, provides that all property transferred under the section except tithe rentcharge transferred to a county council shall be held subject to the existing interests of all persons who on the passing of the Act held ecclesiastical offices in the Church in Wales. Therefore, a tithe rentcharge transferred under the Act to a county council is expressly excepted from the provisions making all transferred property subject to existing interests. Sect. 8, sub-s. 2, no doubt refers to provisions thereafter to be mentioned for tithe rentcharges, but tithe rentcharges are certainly excepted from the scope of that sub-section. When one comes to examine s. 14, sub-s. 1, it is quite apparent that it does not apply to tithe rentcharges, for it provides for the retention of existing interests in the emoluments of an office held by freehold tenure or its equivalent, but under the provisions of s. 8, sub-s. 2, as has been shown, the existing interests in a tithe rentcharge can no longer be retained. It is not s. 14 that deals with charges, but it is s. 15 that expressly deals with them, so that even if there had not been any commutation scheme effected under the provisions of s. 18, s. 14 would not have applied to the case and therefore the proviso to s. 14, sub-s. 1, requiring a person appointed to another ecclesiastical office to hand over the net income formerly held by him does not apply to the case of incomes derived from rentcharges. But this argument goes further than is really necessary for the plaintiff's case. The plaintiff relies on the provisions of s. 18, which expressly provide that where a scheme of commutation is effected and it is effected compulsorily by reason of the provisions of s. 3, sub-s. 1, of the Welsh Church (Temporalities) Act, 1919, the existing interests of holders of ecclesiastical offices in the Church in Wales are determined and the provisions of the Act "respecting existing interests in . . . . property, and the "payment of money in substitution for and in satisfaction "of such interests . . . . shall cease to have effect." That means that s. 8, sub-s. 2, ss. 14 and 15 have all of them ceased to have any effect on the plaintiff's case, and, therefore, in order to see whether his claim is a valid one, one has now merely to look at s. 18. That section nowhere provides that a person who is appointed to another ecclesiastical office shall hand over the net income of the original office to the Representative Body. It merely provides that the holders of ecclesiastical offices in the Church in Wales shall be entitled to be paid an annuity calculated in the manner mentioned subject to any arrangements which may be made between the parties. Therefore it follows that if no arrangements have been made, the plaintiff is now entitled to the annuity provided by s. 18 based on the income he was enjoying from his living in Coity, and in addition he is entitled under the will of Dr. Neale to the income of about 243*l*. a year. As a matter of fact there is no evidence, as asserted by the defendants, that any arrangements were made whereby the plaintiff consented to give up the 243*l*. a year on the understanding that he would retain his original income.

Sir William Jowitt K.C. replied.

Cur. adv. vult.

1938. Jan. 24. The following judgment of the Court (Sir Wilfrid Greene M.R., MacKinnon and Clauson L.JJ.) was read by SIR WILFRID GREENE M.R. On July 3, 1933, the respondent Mr. Price became vicar of Penmark, a Welsh parish in the diocese of Llandaff. Attached to the benefice was a charitable bequest made by one Dr. Neale who died in the year 1917. Under this bequest Mr. Price as incumbent became entitled to receive as an emolument of the benefice the dividends on a sum of conversion stock amounting to a little more than 243*l*. a year. In this action he claims that he is entitled to receive from the Representative Body of the Church in Wales an additional emolument in the form of an annuity of 528*l*. 13*s*. 6*d*. and that he will continue to be entitled to this annuity so long as he holds an ecclesiastical office in the Church in Wales. Under the commutation provisions contained in the Welsh Church Acts hereinafter referred to this annuity of 528*l*. 13*s*. 6*d*. represents the yearly income received by Mr. Price as rector of another Welsh parish, namely Coity, an office which he held on September 18, 1914, the date of the passing of the Welsh Church Act, 1914, and continued to hold down to the day before that on which be became vicar of Penmark. Of that income 520*l*. 4*s*. 1*d*. was derived from tithe rentcharge which had become attached to the benefice of Coity previously to the year 1662 and was in consequence not a "private benefaction" within the meaning of the Welsh Church Act, 1914; the remaining 8*l*. 9*s*. 5*d*. represented income of the proceeds of redemption of similar tithe rentcharge.

Mr. Price claims that notwithstanding that he no longer holds the benefice of Coity he is entitled to receive payment of the annuity by virtue of the provisions of the Welsh Church Acts. To this claim the appellants make two answers. First they say that, whatever be the true effect of the relevant provisions of the Acts, a binding arrangement was made between themselves and Mr. Price whereby he should be entitled to receive in respect of the annuity only such a sum as represents the difference between the income of the Neale bequest and the amount of the annuity. Alternatively they say that upon the true construction of the Welsh Church Act Mr. Price ceased to be entitled beneficially to the annuity when he ceased to hold the benefice of Coity. Luxmoore J. decided in favour of Mr. Price upon the question of the construction of the Welsh Church Acts. Moreover he declined to infer from the materials before him that the arrangement relied upon by the appellants was ever made. Accordingly he made an appropriate declaration in favour of Mr. Price, and the Representative Body now appeals from his judgment.

By virtue of the provisions of the Welsh Church Act, 1914, the Church in Wales was disestablished on March 31, 1920. The Act made elaborate provisions for dealing with property belonging or appropriated to the Church in Wales. The general effect of these provisions, so far as is relevant to the present matter, was to preserve for the Church in Wales certain classes of property, including in particular benefactions made since the year 1662 (in the Act termed "private benefactions"), and to transfer the remainder either to the county councils or to the University of Wales. For the sake of brevity we will refer to the property transferred to the county councils or to the University of Wales as "alienated property." Under s. 8, sub-s. 1, of the Act Welsh ecclesiastical property other than alienated property ultimately became vested in the appellants, the Representative Body constituted by Royal Charter under s. 13, sub-s. 2, of the Act. Of the alienated property which under s. 8, sub-s. 1 (*c*) and (*d*), of the Act was to be transferred to county councils the most important was tithe rentcharge, which was not the subject of a private benefaction. As we have already stated the tithe rentcharge belonging to or appropriated to the benefice of Coity was of this description.

Now it is manifest that in fairness to holders of existing interests (of which for present purposes the most important class were the incumbents) it was necessary to make some provision whereby they should not be prejudicially affected by the alienation of property from which their emoluments were derived. It is also manifest that, if this provision had merely taken the form of preserving their interests in alienated property so long only as they held the benefices to which that property belonged or was appropriated, the result would have been seriously to hamper the freedom of action of the Church authorities, for there would have been a strong deterrent to transfers of the clergy from one benefice to another if such transfers were to result in a loss of church income. There could be no just reason why the new owners of the alienated property should obtain by such transfers, which did not in any way concern them, a release from a liability which would have continued during the lifetime of existing incumbents if they had remained where they were. Accordingly the Act provided, not merely for the preservation of these interests, but for their continuance during such time as the person in enjoyment of them should hold any ecclesiastical office in the Church in Wales. The provisions of the Act by which these results were achieved require detailed examination.

Sect. 8 of the Act, after providing for the transfer of alienated property as already stated, provided by sub-s. 2 as follows: " Save as otherwise provided by this Act, all " property transferred under this section shall be held " subject to all existing public and private rights with respect " thereto, and all tenancies, charges, and incumbrances " which may at the date of transfer be subsisting therein, " and in the case of all such property, except tithe rentcharge " transferred to a county council, to the existing interests " of all persons who at the passing of this Act hold " ecclesiastical offices in the Church in Wales, and in the " case of such tithe rentcharge to the obligation to make " such provision as is hereinafter mentioned in lieu of such " existing interests." " Existing " as defined by s. 38, sub-s. 1, of the Act means existing at the passing of the Act, namely, September 18, 1914. The effect of this provision was that in the case of alienated property other than tithe rentcharge (such as land) the property remained subject to the existing interest of the incumbent, notwithstanding its transfer to the county council or the University of Wales as the case might be; while in the case of tithe rentcharge it was transferred subject to the obligation to make provision " in lieu of " the existing interest.

If the Act had stopped there the incumbent's right against the alienated property itself or (in the case of tithe rentcharge) his right to claim the substituted provision would have ceased as soon as he left the living which he held on September 18, 1914, since his " existing interest " would then have determined. Accordingly s. 14, sub-s. 1, provides as follows: " Any person who at the date of the passing

" of this Act holds an ecclesiastical office affected by this " Act by freehold tenure or by any tenure which, in the " opinion of the Welsh Commissioners, is in practice " equivalent to freehold tenure shall retain his existing " interest in the emoluments of that office so long as he " holds that office or any other ecclesiastical office in the " Church in Wales to which he may be nominated or appointed " after the passing of this Act, whether before or after the " date of disestablishment," while s. 14, sub-s. 2, provides that: " On such a person as aforesaid ceasing for six months " to hold any ecclesiastical office in the Church in Wales such " existing interest as aforesaid shall determine."

There is one expression in the words quoted from s. 14, sub-s. 1, which requires elucidation, namely, " interest in " the emoluments" of the office. Light is thrown upon its meaning by the opening words of sub-s. 5, namely, " Where the emoluments of any such ecclesiastical office " in the Church in Wales do not consist of an interest in " any specific property" and by an expression in sub-s. 7, namely, " the property out of which the emoluments of " that office were payable." It would appear, therefore, that where the emoluments are payable out of specific property the expression " interest in the emoluments" is equivalent to " interest in the property out of which the " emoluments are payable." The effect of these provisions, if they had stood alone, would have been to leave the existing incumbent in enjoyment of his existing emoluments notwithstanding that he was transferred from the benefice to which they were attached to another. Accordingly after the passage already cited from s. 14, sub-s. 1, the following proviso is inserted: " Provided that where any such person " is nominated or appointed to any ecclesiastical office in " the Church in Wales, other than that which he held at " the passing of this Act—(*a*) he shall (save as otherwise " expressly provided by this Act) pay over the net income " of the ecclesiastical office held by him at the passing of " this Act to the representative body."

We will defer for the moment consideration of the question of the application of these provisions to the case of tithe rentcharge. In the case of other property, for example, land the income from which formed part of the emoluments of a benefice, there can be no question as to their applicability. The land would be transferred to the county council under s. 8, sub-s. 1 (*d*); by virtue of s. 8, sub-s. 2, it would remain subject to the existing interest of the existing incumbent; by s. 14, sub-ss. 1 and 2, that interest would continue so long as that incumbent held any ecclesiastical office in the Church in Wales and for six months longer; and by the proviso to s. 14, sub-s. 1, the existing incumbent, on changing his parish, although still entitled to receive the emoluments derived from the land, would be bound to pay over the net income to the Representative Body, in whose hands it would be part of the general funds available for the support of the Church in Wales.

Sect. 15 deals with the case of tithe rentcharge and contains the " provision in lieu of existing interests " promised by s. 8, sub-s. 2. The relevant words of the section are as follows: " (1.) There shall be paid to each person who has " any existing interest in any tithe rentcharge transferred " to a county council under this Act, in substitution for " and in satisfaction of that interest, and so long as that " interest would otherwise have continued, the annual " amount, according to the septennial average for the time " being, of that tithe rentcharge, after deducting such sum " as may be allowed by the Welsh Commissioners for cost " of collection, rates, and other outgoings." Under sub-s. 2 the amounts payable are to be paid to the Representative Body " upon trust to pay over the same to the person " who had such an existing interest as aforesaid."

Now although the question raised on this appeal depends directly upon the later provisions of the Act relating to commutation it is necessary to examine the situation as it would have existed if no commutation had taken place, more particularly as Mr. Christie on behalf of the respondent bases an argument upon these sections. He says that s. 14 is not concerned with tithe rentcharge at all, since existing interests in tithe rentcharge are not preserved by s. 8, sub-s. 2. Consistently with this he says that the obligation of the county council under s. 15 to make the payments there specified only continues for "so long as" the existing interest "would otherwise have continued," a phrase which he interprets as equivalent to "so long as the existing interest "would have continued if this Act had not been passed." Upon this basis, if there had been no commutation and s. 15 had been left to govern the case, the liability of the county council to make payments under that section would have ceased when Mr. Price ceased to hold the benefice of Coity.

We are unable to agree with these contentions. If they had been well-founded, a situation would have arisen of a highly anomalous nature. For whereas in the case of all other alienated property the Church in Wales would have continued to have the benefit of the existing income so long as the existing incumbent held any ecclesiastical office in it, in the case of tithe rentcharge the benefit would have ceased directly the existing incumbent gave up his existing benefice for another. No reason was suggested for this differential treatment, nor is any reason apparent. But apart from these considerations the Act does not in our opinion mean what Mr. Christie says it means. In the first place s. 8, sub-s. 2, speaks of the provision which the county council is to be obliged to make in the case of tithe rentcharge as being "in lieu" of "existing interests" in the tithe rentcharge. This language does not suggest that the substituted obligation is to be different in point of duration from the interest for which it is substituted—rather the contrary. The sub-section read as a whole is in our opinion quite consistent with and indeed points to the conclusion that the substituted obligation is to be substituted for the existing interests as prolonged in point of duration by the later provisions of the Act. Those provisions are contained in s. 14, sub-s. 1. That sub-section, apart from the proviso, appears to us to deal merely with the question of the duration of existing interests which is artificially prolonged, with the result that the existing interest is treated as "continuing" during the period of prolongation —see the words already cited from s. 14, sub-s. 7. It is to be noted that sub-s. 1 of s. 14 is quite general in its language. The phrase used is "the emoluments of that "office" not "the emoluments of that office so far as "derived from property other than tithe rentcharge "transferred to a county council." Reading s. 8, sub-s. 2, and s. 14, sub-s. 1, together the effect in our opinion is that all existing interests in emoluments are prolonged, alienated property other than tithe rentcharge remains subject to those interests so long as they continue, while in the case of tithe rentcharge the obligation to be substituted for the existing interest is to continue so long as that interest would have continued but for the substitution. Is this construction consistent with s. 15, sub-s. 1? In our opinion it is. The true meaning of the phrase in that sub-section "would "otherwise have continued" is, we think, not that contended for by Mr. Christie. It is "would but for the "substitution have continued," namely, the period prescribed by s. 14, sub-s. 1.

In this connection it is worth calling attention to a somewhat similar expression in the proviso to s. 4, sub-s. 2, of the Welsh Church (Temporalities) Act, 1919, namely, "so long as that interest would have continued" which clearly covers the extended duration of the interest. If this view is correct, the result would have been that Mr. Price would have remained entitled to receive the 528*l.* 13*s.* 6*d.* notwithstanding his transfer to Penmark; but under the proviso to s. 14, sub-s. 1, he would have been bound upon such transfer to pay over the net income of the benefice of Coity to the Representative Body in just the same way as if those emoluments had been derived from the rents of land.

The provisions of the Act with regard to alienated property would have led to obvious inconveniences in practice. The Act accordingly contains a commutation scheme the object of which was to commute all existing interests for a lump sum payment to the Representative

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Body. Under the Act of 1914 the adoption of this commutation scheme was optional in the Representative Body but it was made compulsory by s. 3, sub-s. 1, of the Welsh Church (Temporalities) Act, 1919. The scheme is contained in s. 18 of the Act of 1914 and is described as a "scheme of commutation." This description does not suggest that one of the results of its adoption—and it is important to remember that adoption was originally optional—would be to confer upon existing incumbents whose emoluments were derived from alienated tithe rentcharge a special pecuniary advantage to the prejudice of the Church as a whole. For if the respondent's argument on this branch of the case be accepted, the result will be that whereas if no commutation had taken place he would have been bound to hand over the 528*l.* 13*s.* 6*d.* to the Representative Body, as the result of the commutation he will be entitled to keep it for his own benefit so long as he holds any ecclesiastical office in the Church in Wales. It would require clear language to produce from a commutation scheme, as it were by a side wind, a result so entirely alien to its ostensible purpose.

The scheme provides for the extinction of all existing interests of the holders of ecclesiastical offices in the Church in Wales in the alienated property; the payment by the Welsh Commissioners to the Representative Body of a lump sum equal to the aggregate value of those interests; and the payment by the Representative Body to the holder of the interest (if of freehold tenure or its equivalent) of an annuity so long as he holds an ecclesiastical office in the Church in Wales. The provision for fixing the value of the existing interests and the amount of the annuity are important. They are contained in the Fourth and Fifth Schedules respectively. Under the Fourth Schedule the value of an existing interest is to be taken as the value of an annuity during the life of the existing holder of the office of an amount equal to the annual value of the interest, which, in its turn, is (in the case of specific property) to be taken to be the annual income derived from the property; and rules are laid down as to what that annual income is to be taken to be in the particular cases of tithe rentcharge and land. The sum to be paid therefore in order to free once for all the alienated property (or in the case of tithe rentcharge the county councils themselves) from the burden of existing interests was to be calculated on the basis of the expectancy of life of the existing incumbent. This is consistent with the scheme of the Act under which the existing interests were to continue in spite of transfers from one parish to another. Moreover the fact that this basis is taken in the case of tithe rentcharge as well as in that of other property affords strong confirmation for the view already expressed as to the true meaning of ss. 14 and 15 as applied to the case of tithe rentcharge.

The Fifth Schedule provides that the annuity payable to the existing holder of the office is to be an amount equal, in the case of specific property, to the annual income derived from that property; and rules are laid down for determining the amount of that annual income in the case of tithe rentcharge and land.

So far there is nothing to suggest that the holder of an existing interest is to have his position improved as the result of commutation. But Mr. Christie contends that certain language in s. 18, to which we have not yet referred, produces this result. It was in order to soften the effect of this contention if correct that he advanced the argument upon ss. 14 and 15 with which we have already dealt. For he said that the added benefit conferred upon Mr. Price by s. 18 as he construed it was at any rate not given to him at the expense of the Representative Body, since that Body would never, as he said, have received anything in respect of the Coity emoluments which would have ceased to be payable when Mr. Price left that parish. But this argument loses sight of the fact that had the emoluments been derived from the rents of land there would, on any view, have been a prejudice to the Representative Body if the argument on s. 18 be a sound one. For the argument is that the annuity payable under the commutation scheme would belong absolutely to Mr. Price in every case whether it represented an interest in the rents of land or an interest in tithe rentcharge.

Bearing these considerations in mind, we turn to s. 18. By para. (*a*) of that section it is provided that, if the commutation scheme is accepted, the existing interests of the holders of ecclesiastical offices in the Church in Wales shall determine and that " the provisions of this Act respecting "existing interests in such property, and the payment of "money in substitution for and in satisfaction of such "interests . . . . shall cease to have effect." Para. (*b*) provides for the payment by the Welsh Commissioners to the Representative Body of " the aggregate value of the "existing interests of holders of ecclesiastical offices in the "Church in Wales in such property as aforesaid " being offices of freehold tenure or its equivalent " such value to be "ascertained in manner provided by the 4th Schedule "to this Act." Para. (*e*) provides that the holder of an ecclesiastical office of freehold tenure or its equivalent " shall, "subject to any arrangements which may be made between "him and the representative body, be entitled, in lieu of his "existing interest in such property as aforesaid, to an annuity "calculated in manner provided by the Fifth Schedule to this "Act, so long as he continues to hold an ecclesiastical office "in the Church " in Wales. By para. (*f*) it is provided that: "Every annuity payable under this section shall be charged "on the property for the time being vested in the representative "body, and shall be treated as part of the emoluments of the "ecclesiastical office which the annuitant held at the passing "of this Act."

The words upon which the respondent particularly relies are those cited above from para. (*a*). It is said that s. 18 is a complete code in itself and that the effect of those words is to render inapplicable (among other provisions) the whole of s. 14, including in particular the proviso to para. (*l*). Upon this basis it is said that the annuity conferred upon the holder of the office by para. (*e*) belongs to him beneficially throughout the whole period there mentioned. This view found favour with the learned judge, but with all respect to his opinion we are unable to agree with it. The words cited from para. (*a*) clearly render inapplicable the provisions of s. 8, sub-s. 2, relating to the existing interests of the holders of ecclesiastical offices. They also render inapplicable s. 15. But s. 14, sub-s. 1, stands upon a different footing. That sub-section does not merely deal with the preservation and duration of existing interests as against the transferees of alienated property—so far as it does so it is, we think, rendered inapplicable by para. (*a*) of s. 18. But it also deals in the proviso with a totally different matter—namely, the financial relationship of the holder of the office to the Representative Body upon his transfer to a different office. The proviso, although in form a proviso, is in effect a substantive enacting clause imposing upon the holder of the office upon such transfer the obligation to pay over to the Representative Body the whole of the net income (not, be it observed, the actual income derived from the interest) of the original office. Having regard to its subject-matter this proviso cannot in our opinion be treated as one of " the "provisions of this Act respecting existing interests in such "property " displaced by para. (*a*).

This construction is, we think, quite consistent with para. (*e*) and is confirmed by para. (*f*). Para. (*e*) gives the annuity to the holder of the office " in lieu of his existing "interest." The annuity in point of duration is the same as the interest as extended by s. 14, sub-s. 1. The grant of the annuity in our opinion is a mere substitution for the rights in respect of the existing interest conferred by the Act. The alienated property and the bodies to whom it is transferred are freed from all obligations in respect of existing interests ; those obligations, or rather the substituted obligations to pay annuities of equivalent value and duration, are transferred to the Representative Body. The resulting situation must be fitted into the Act, substituting the right to receive the annuity for the existing interest.

But the words already cited from para. (*f*) in our opinion are conclusive upon this matter. Mr. Christie argued that the application of these words must be limited to the specific matters mentioned later in the paragraph. We cannot accept this argument. The words are quite general and the specific matters are in our opinion merely examples of their application. How then can effect be given to these words in the present case? If the respondent is entitled as he claims to retain the annuity for himself, how can it be said that it is being "treated as part of the emoluments" of the benefice of Coity? The object of these words is, we think, to make clear what might otherwise have been left in doubt, namely, that although the annuity is to last so long as any ecclesiastical office in the Church in Wales is held, it is to be treated, as between the annuitant and the Church, as part of the emoluments of the original office. It therefore falls to be dealt with in accordance with the proviso to s. 14, sub-s. 1, in the same way as the income from the existing interest for which it is substituted would have been dealt with if the commutation scheme had never been adopted.

For these reasons we are of opinion that the appellants' construction of the Act is the right one. But they are also in our view entitled to succeed upon the other contention which they put forward, namely, that the rights of Mr. Price are governed by an arrangement made at the time when he left Coity for Penmark. There is no direct evidence of the making of this arrangement, since Mr. Morgan, who was the secretary to the appellants at the time, is unfortunately dead; while counsel who appeared for Mr. Price at the trial did not think fit to call his client, who was the only living person capable of assisting the Court to arrive at the truth of what took place at the relevant interview. The matter rests upon the inference to be drawn from the acts of the parties and certain correspondence. The learned judge declined to draw any such inference as the appellants claimed should be drawn, not, as we read his judgment, because there was not sufficient material to justify him in drawing the inference that as a matter of form the arrangement was made, but because Mr. Morgan had no authority to bind the appellants.

The relevant facts can be shortly stated. The benefice of Penmark was first offered to Mr. Price by a letter from the

Archdeacon of Llandaff dated May 22, 1933. At that date there was in existence a practice adopted by the Representative Body under which upon the transfer of an incumbent from one benefice to another, if the emoluments of the former in which he had a vested interest were greater than those of the latter, he was allowed to keep such an amount in respect of his vested interest and such an amount only as, together with the emoluments of the new benefice, would equal the amount of the vested interest. This was, of course, equivalent to allowing him to keep his vested interest upon the terms that he handed over the emoluments of the new benefice to the Representative Body. The Archdeacon in his letter said that he had no reason to doubt that Mr. Price would carry his vested interests with him, but to make certain it would be well for him to see Mr. Morgan. Pursuant to this suggestion Mr. Price saw Mr. Morgan on May 25, and it is clear and it is not disputed that the question of the vested interest was discussed. It would, of course, have been Mr. Morgan's duty to inform Mr. Price of the practice to which we have referred, although we agree with the view of the learned judge that he had no authority to enter into a binding agreement. What passed between Mr. Price and Mr. Morgan is a matter of inference, since, as we have already said, Mr. Price, who could have informed the Court upon this matter, was not called. The correspondence however, especially when coupled with the fact that Mr. Price was not called—a fact to which in all the circumstances of the case we are entitled to attach considerable weight—satisfies us as to the inference to be drawn.

After the interview and on the same day Mr. Price wrote to Mr. Morgan a letter which is extremely obscure; but whatever be its true meaning it is not the letter which would have been written by one who thought that he was to receive both his vested interest and the income of the Neale bequest. The letter was not answered. On July 3 Mr. Price was inducted to the living of Penmark. Some two months later, on September 7, 1933, Mr. Price wrote again to Mr. Morgan. This letter does not appear to us to carry the matter any further. But in his reply of September 8 Mr. Morgan stated that at a committee meeting on June 13 it was agreed that Mr. Price "will be entitled to be paid by the Representative "Body the difference between the income he receives direct "from the Neale bequest and the amount of his vested "interest, namely, the income from the trust fund shall form "part of and shall not be in addition to the stipend. In "January therefore we will deduct from your stipend the "interest on the Neale bequest which you will receive "presumably on the 1st November." Mr. Price did not answer this letter, a fact which appears to us to be of paramount importance. On September 30, 1933, a cheque was sent to Mr. Price for 129*l.* 5*s.* 10*d.*, being stipend for the period from July 3 to September 30, 1933, at the rate of 528*l.* 13*s.* 6*d.* per annum less an immaterial deduction. On December 30, 1933, a cheque was sent to him for stipend at the same rate from October 1, 1933, to December 31, 1933, less a similar deduction and less 121*l.* 13*s.* 5*d.*, being a half-year's interest on the amount of Conversion Stock representing the Neale bequest. Mr. Price wrote on January 2, 1934, protesting against this latter deduction and claiming to be entitled to the income of the Neale bequest in addition to his vested interest. He then placed the matter in his solicitors' hands. On January 6, 1934, Mr. Morgan wrote a letter to the solicitors stating that in the case of Mr. Price's predecessor at Penmark it had been decided that he should not have his vested interest plus the income of the Neale bequest; that other incumbents had been offered the benefice on the same terms; and that the Representative Body had been advised that under s. 14 of the Act incumbents were bound to pay over the endowments received from vested interests. Mr. Morgan also stated that he was informed that Mr. Price was offered the living on the distinct understanding that the terms above mentioned should apply. This last statement was in fact made in error.

On January 9, 1934, the solicitors replied to the effect that the living was not offered to Mr. Price on that understanding and that at the time when he first accepted it he was quite ignorant of the Neale bequest. This latter statement was inaccurate, as clearly appears from Mr. Price's letter of September 7, 1933. On January 12, 1934, Mr. Morgan wrote correcting the error in his letter of the 6th and stating that "on the 25th May of last year, when Mr. Price "came to see me, I made it perfectly clear to him" that he would only receive his vested interest. To this statement the only reply made by the solicitors was to repeat the inaccurate statement that when the living was offered and accepted no mention was made of the Neale bequest. Mr. Morgan's statement therefore in effect remains unanswered.

It appears to us that upon these facts the proper inference to be drawn is that at the interview on May 25 Mr. Morgan made it clear to Mr. Price that he would only be entitled to receive by way of emoluments a sum equal to his vested interest. The fact that Mr. Morgan had no authority to bind the Representative Body does not appear to us to be of importance. He unquestionably had authority to inform Mr. Price that the practice of the Representative Body was not to allow incumbents on a change of benefice to receive more than their vested interests and that this practice would be followed in his case. On June 13 the General Purposes Committee resolved to follow the practice in the case of Mr. Price and their resolution was adopted by the Representative Body on July 28, 1933. Thus, if Mr. Morgan had exceeded his authority in telling Mr. Price that he would not be entitled to more than his vested interest, his action was effectively ratified. This was the arrangement on the footing of which Mr. Price accepted the living and was inducted to it; and upon such acceptance and induction the terms became binding as between him and the Representative Body and he cannot now repudiate them.

The appeal must be allowed with costs.

Appeal allowed.

Solicitors for appellants: *Deacon & Co., for Barker, Morris & Owen, Carmarthen.*

Solicitors for respondent: *Gibson & Weldon, for Northcott Howell, Cardiff.*

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C. A.

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Jan. 11, 12;

Feb. 17.

In re WHITE STAR LINE, LIMITED.

[No. 00210 of 1935.]

Company—Scheme of arrangement—Debts and liabilities satisfied by issue of deferred creditors' certificates—Call on shares by another company—Certificates issued of nominal amount of call—Certificate worth less than nominal value—Accord and satisfaction—Certificates not money's worth—Ultra vires—Set off—Right of company issuing certificates to prove for debt in liquidation of the other company—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 157.

The specialty debt resulting from a call on shares of a company can only be discharged by accord and satisfaction when the company has received money or money's worth. For this purpose the consideration given by way of payment must be something which is regarded by the parties to the transaction as fairly representing the sum to be discharged. The consideration must not be a clear blind or clearly colourable or illusory.

When, therefore, R. M. Co. purported to satisfy a call on shares of W. Co. held by R. M. Co. by the issue of deferred creditors' certificates equal in nominal amount to the sum due, under a scheme of arrangement agreed to by W. Co., and the evidence established that to the knowledge of all the parties the certificates were always worth less than their nominal value and that the certificates were not accepted as in any sense a payment of the sum due for calls but as the best that could be saved out of the wreck of R. M. Co., R. M. Co. were not entitled to a dividend in the winding up of W. Co. in respect of a contract debt found to be due to them until the amount of the calls was paid in full:—

So held by Lord Romer, MacKinnon and Clauson L.JJ., reversing the decision of Bennett J.

The language of Lindley L.J. in *In re Wragg, Ld.* [1897] 1 Ch. 796, 826, 829, considered and explained.

APPEAL from Bennett J.

By an agreement dated November 27, 1926, between the International Mercantile Marine Co. (hereinafter called " the Marine Co.") and the Royal Mail Steam Packet Co. (hereinafter called " the Royal Mail Co."), the Royal Mail Co. agreed to purchase from the Marine Co. the whole of the issued share capital of the Oceanic Steam Navagation Co., Ld. (hereinafter called " the Oceanic Co.") as on January 1, 1927, for the sum of 17,000,000*l.* payable in four instalments, the balance for the time being unpaid to bear interest at the rate of 4 per cent. per annum payable yearly on December 31.

By an agreement dated January 12, 1927, the White Star Line, Ld. (hereinafter called "the White Star Co.") agreed to purchase from the Royal Mail Co. the whole of the issued share capital of the Oceanic Co. for the same price and on the same terms as to payment, except that each instalment of the purchase price was to be paid on the day before the corresponding instalment became payable to the Marine Co. The first three instalments and 150,000*l.* on account of the final instalment of 2,500,000*l.* accruing on December 31, 1936, were duly paid on or before that date by the White Star Co. to the Royal Mail Co. and by the Royal Mail Co. to the Marine Co. Default was made by the White Star Co. in payment of the yearly instalment of interest which fell due on December 31, 1931, by the White Star Co. to the Royal Mail Co. and by the Royal Mail Co. to the Marine Co. and thereupon the balance of the last instalment with interest thereon became immediately payable.

At the end of 1931 the Royal Mail Co. was the registered holder of 501,100 ordinary shares of the White Star Co. of 1*l.* each paid up to the extent of 2*s.* a share and another 1,000,000 ordinary shares paid up to the extent of 14*s.*, and calls had been made for the amount payable on these shares.

In 1932 the Royal Mail Co. and many of its subsidiary and associated companies put forward a scheme of arrangement dated February 23, 1932, between those companies and their creditors. By a document dated April 7, 1932, the White Star Co. approved and assented to the scheme (subject to its being sanctioned by the Court) in regard to a sum of 750,990*l.*, representing the unpaid calls on the shares in the White Star Co. held by the Royal Mail Co. and 42,022*l.* interest thereon.

By a letter dated May 19, 1932, the Royal Mail Co. wrote to the solicitors of the Marine Co. saying: "Subject to your "clients agreeing to the scheme we are prepared to admit "that, by reason of the default which has already taken place "on our part, your clients have an accrued debt of 2,444,000*l.* ". . . . being as to 2,350,000*l.* the outstanding principal "originally due in 1936 and as to 94,000*l.* the unpaid interest "in respect of the year 1931. Your clients will then, subject "as aforesaid, rank under the scheme as immediate creditors "for the sum of 2,444,000*l.* and for such further interest "thereon as may hereafter become due." Subsequently at the hearing of the application for the Courts sanction to the scheme, the Marine Co. gave their assent to the scheme.

On the same day the Royal Mail Co. wrote to the White Star Co. stating that they understood that as a condition of their agreement to the scheme the White Star Co. desired to have the position made clear with regard to their liability in respect of the payment of the final instalment and interest payable under the agreement of January 12, 1927. The letter continued :

" We confirm that our understanding of the position is—

" (*a*) That you admit that by reason of a default which has "already taken place on your part in payment of interest, "there is an accrued debt of 2,444,000*l.* due to us being as to "2,350,000*l.* the outstanding principal originally due in 1936 "but now admittedly accrued due by reason of the said "default, and as to 94,000*l.* the unpaid interest in respect of "the year 1931 ;

"(*b*) That in the event of the scheme of arrangement dated "February 23, 1932, going through and becoming operative, "your liability for payment to us of the final instalment and "interest under the agreement of 1927 will be limited to "paying us such sum as we may ourselves become liable to "pay in cash in respect of such instalment and interest "including any cash payment we may make either in respect "of the deferred creditors' certificates which under the scheme "the International Mercantile Marine Co. are to be deemed to "hold . . . . and we undertake that on receipt from you of "any such payment we will pay the sum to the International "Mercantile Marine Co.

"Please confirm the above understanding."

On May 30, 1932, the White Star Co. replied confirming this understanding.

Under the scheme, which received the sanction of the Court on June 24, 1932, all debts and liabilities of the Royal Mail Co. (including unpaid calls on shares held by the Royal

Mail Co.) were to be satisfied and discharged by the issue of unsecured income obligations of the nominal amount of the debts or liabilities to be known as deferred creditors' certificates carrying cumulative interest at the rate of 5 per cent. per annum payable annually if and to the extent that the net earnings of the Royal Mail Co. available for payment of such interest should be sufficient to pay that interest. Any surplus net earnings in any year were to be applied first in paying arrears of interest and, secondly, in paying off capital. There was to be no due date for payment of the deferred creditors' certificates, but they, with all arrears of interest, were to become payable in the event (amongst others) of the Royal Mail Co. going into liquidation. Under the scheme the White Star Co. was given the right to nominate a director and the other holders of deferred creditors' certificates the right to nominate another director of the Royal Mail Co. out of a total of eight directors. Deferred creditors' certificates of the nominal value of 793,012*l.* were issued to the White Star Co. in respect of the unpaid calls on the above mentioned shares with interest thereon down to December 31, 1931.

On April 8, 1935, an order was made for the winding up of the White Star Co., and on February 10, 1936, for the winding up of the Royal Mail Co. The senior official receiver became the liquidator of the White Star Co., and Sir William McClintock was appointed to be liquidator of the Royal Mail Co. No interest had been paid in the meanwhile on the deferred creditors' certificates.

After an earlier proof had been rejected the Royal Mail Co., on March 2, 1937, lodged in the winding up of the White Star Co. a proof for 1,942,261*l.* 7*s.* 8*d.*, being the balance claimed to be due in respect of the following items—namely, the sum of 2,350,000*l.* mentioned above with the sum of 513,406*l.* 19*s.* 7*d.* due for interest thereon, and three small items for costs and remuneration of the trustees in whom the shares of the Oceanic Co. were vested amounting to 51*l.* 18*s.* 1*d.*, making together the sum of 2,863,458*l.* 17*s.* 8*d.* after deducting therefrom the sum of 793,012*l.* in respect of the capital of the deferred creditors' certificates held by the White Star Co.

and 128,185*l.* 10*s.* interest thereon. The liquidator of the White Star Co. rejected the proof except as regards the sum of 51*l.* 18*s.* 1*d.* on the grounds (amongst others) that—

(1.) At the date of the commencement of the liquidation of the White Star Co. the Royal Mail Co. were the registered holders of 1,501,100 shares of the company, which were unpaid to the extent of 750,990*l.* and interest, and the Royal Mail Co. was not entitled to rank for dividend or to prove except upon the footing of first paying the amount unpaid thereon or the sums due in respect of calls made thereon together with interest.

(2.) Calls had in fact been made in respect of these shares and such calls had never been paid or satisfied.

(3.) If it was alleged that there was any agreement whereby the White Star Co. accepted certain unsecured obligations of the Royal Mail Co. known as deferred creditors' certificates in satisfaction of the said liability for calls on the said shares—

(*a*) such deferred creditors' certificates were at all material times to the knowledge of the parties valueless, or, alternatively, worth a great deal less than their nominal or face value and such alleged agreement was ineffective in law to satisfy such liability or to entitle the Royal Mail Co. to rank in the liquidation otherwise than as shareholders whose shares were not fully paid . . . .

(4.) Further or in the alternative by two letters dated May 19 and 30, 1932, ... the White Star Co. and the Royal Mail Co. agreed that the White Star Co. should pay only such sums as might in fact be paid by the Royal Mail Co. to the Marine Co. in respect of the purchase price payable to the Marine Co. by the Royal Mail Co. and no such sums had in fact been paid.

On March 6, 1937, the Royal Mail Co. took out a summons (in place of an earlier summons) asking that the decision of the liquidator of the White Star Co. rejecting the proof except as to 51*l.* 18*s.* 1*d.* might be reversed and that the proof might be allowed in full.

The evidence as to the value of the deferred creditors' certificates was contained in two letters of the liquidator of the Royal Mail Co. dated March 25 and May 3, 1937, the effect of which is stated in the judgment and an affidavit sworn on April 20, 1937, by Frank Charlton, who at all material times was the secretary of the trustees in whom the voting control of the Royal Mail Co. was vested and by whom the scheme of arrangement was prepared, and was also from 1930 until the date of liquidation a director of the White Star Co., in which he stated:—

"(2.) From knowledge acquired by me while acting in my "capacities aforesaid I say that it was well known to every- "body concerned that the deferred creditors' certificates ". . . . to be issued or treated as issued under the 1932 scheme of "arrangement were at all material times and in particular at "the time when the said scheme was sanctioned by the Court "worth a great deal less than their nominal or face value.

"(3.) Everyone with a knowledge of the affairs of Royal "Mail realized when the scheme was sanctioned and also "when the certificates were issued that it must be several "years before the revenue of Royal Mail would be sufficient "to permit of any payment of interest on the said certificates.

"(4.) The above mentioned facts were well known at all material "times . . . . to the directors of the White Star Line, Ld."

Bennett J. said that the first contention on behalf of the liquidator of the White Star Co. was that the specialty debt due from the Royal Mail Co. to the White Star Co. was not satisfied and discharged, but that the payment of it was merely postponed as a result of the issue of the deferred creditors' certificates under the scheme. In his judgment the scheme was framed on the footing that it would operate to effect a satisfaction and discharge of the debts and liabilities of the Royal Mail Co. and substitute for them the deferred creditors' certificates. Accordingly, if the contract was valid, its necessary effect was to discharge the specialty debt due from the Royal Mail Co. to the White Star Co. on the shares in question and to substitute the debt arising from the deferred creditors' certificates.

The next question turned on the construction of the letter of May 19, 1932. It was said by the liquidator of the White Star Co., in rejecting the proof, that it was agreed by the two

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letters of May 19 and 30, 1932, that the White Star Co. should pay to the Royal Mail Co. only such sum as might in fact be paid by the Royal Mail Co. to the Marine Co. in respect of the purchase price of the Oceanic Co.'s shares, and that nothing had in fact been paid. That argument required either the addition of the words " and pay " in the letter of May 19, 1932, so that the White Star Co.'s liability was limited to paying such sums as the Royal Mail Co. might " become "liable to pay and pay in respect of such instalments," or the omission of the words " become liable to," so that the White Star Co.'s liability was limited to such sums as the Royal Mail Co. might " pay in cash in respect of such instalments." No satisfactory reason was advanced for adopting either course, and the letter as it stood was reasonably clear and intelligible. This contention also failed.

There remained the main and important question as to the validity of the contract contained in the scheme of arrangement. If valid, the contract had the effect of discharging the specialty debt due for calls and interest thereon and substituting the debt due on the deferred creditors' certificates. It also had the effect of making the shares held by the Royal Mail Co. in the White Star Co. fully paid. The importance of this was that the qualities of the two debts differed and that the debt due on the deferred creditors' certificates could be set off against the debt due from the White Star Co. to the Royal Mail Co., while the specialty debt due for calls and interest could not. By the terms of the trust deed constituting the deferred creditors' certificates the Royal Mail Co. were fettered in respect of their right to borrow money and, if they made profits, their right to deal with the profits as they pleased; and there was a measure of control over the conduct of the business of the Royal Mail Co. given to the holders of the deferred creditors' certificates. These restrictions on their rights were part of the consideration money from the Royal Mail Co. to the White Star Co. In addition, the White Star Co. was for a time freed from their liability to the Royal Mail Co. under the contract of January 12, 1927, and the effect of the letters of May 19 and 30, 1932, was to reduce the rate of interest payable during the period from January 1, 1931, to March 26, 1935. It was conceded that the transaction, if entered into between a specialty creditor and a debtor, whose capacity to contract was unrestrained, or entered into between two companies in reference to a specialty debt not due upon unpaid shares, would have resulted in the specialty debt being discharged by accord and satisfaction. But it was said that a company formed under the Companies Acts could only accept, in discharge of a debt for calls on their shares, money or money's worth, and that the money's worth must consist of property or of a debt equal to the calls and presently due from the shareholder, the company.

Founding himself on the judgment of Lindley L.J. in *In re Wragg, Ld.* (1), he would hold that the transaction in question did operate by way of accord and satisfaction to discharge the debt on the shares of the White Star Co. held by the Royal Mail Co. The result was that the application succeeded. There would be an order expunging the original proof and admitting the proof for 1,802,161*l.* 9*s.* 7*d.*

The liquidator of the White Star Co. appealed. The appeal was heard on December 17 and 20, 1937, and January 11 and 12, 1938, and judgment was given on February 17, 1938.

C. E. Harman K.C. and *Gerald Upjohn* for the appellants. On the construction of the scheme of arrangement there was no accord and satisfaction by the issue of deferred creditors' certificates in respect of the indebtedness of the Royal Mail Co. to the White Star Co. for calls. The effect of the scheme of arrangement was merely to postpone the liability.

But, if there was what purported to be an accord and satisfaction, it did not cause the shares held by the Royal Mail Co. to be fully paid up, because it was ultra vires for the White Star Co. to accept less than the calls in money or money's worth. The shares remained unpaid for every purpose and nothing but payment of the calls would suffice: see *Hopkinson* v. *Mortimer, Harley & Co., Ld.* (2) The liquidator

(1) [1897] 1 Ch. 796.

(2) [1917] 1 Ch. 646.

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of the White Star Co. cannot be bound by the agreement to accept deferred creditors' certificates in satisfaction of the calls: *In re Cordova Union Gold Co.* (1) There is no effective answer here to the liquidator when he puts the Royal Mail Co. on the list of contributories. It is not as if there was some right conferred outside the issue of the deferred creditors' certificates, which postponed payment of the debt indefinitely, that sufficed to make the issue of the certificates amount to payment in money's worth. The rate of interest to be paid was actually reduced and the rights of control over the Royal Mail Co. conferred on the holders of deferred creditors' certificates were merely incidental to the postponement of payment of the debt. This question is the subject of a large number of decisions commencing from *In re Richmond Hill Hotel Co.*; *Pellatt's Case.* (2) That case decided that Pellatt, who had applied for fifty 10*l.* shares on the faith of an agreement with a director that he should receive orders for goods, that he should pay only 30*s.* per share in cash, and that the calls for the rest should be set off against the goods, was not a contributory, as he had only agreed to take the shares upon the conditions of a special agreement as to set-off; and it decided, also, that an agreement that the calls payable by a tradesman who is a shareholder in a company shall not be payable in cash, but only by set-off against goods supplied by him is, in general, ultra vires. Sect. 25 of the Companies Act, 1867, upon which *Fothergill's* case (3) was based, was repealed by the Companies Act of 1900; but the shareholder is still liable to pay in cash the amount "unpaid" on his shares under s. 157, unless the shares have been paid up in full in money or money's worth.

[They referred to *In re Almada and Tirito Co.* (4), *Ooregum Gold Mining Co. of India* v. *Roper* (5), *In re Eddystone Marine Insurance Co.* (6), Buckley on the Companies Acts, 11th ed., p. 109, and *In re Wragg, Ld.* (7)]

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(1) [1891] 2 Ch. 580.
(2) (1867) L. R. 2 Ch. 527.
(3) (1873) L. R. 8 Ch. 270, 279.
(4) (1888) 38 Ch. D. 415.
(5) [1892] A. C. 125.
(6) [1893] 3 Ch. 9.
(7) [1897] 1 Ch. 796.

Lastly, the effect of the letters of May 19 and 30, 1932, was that the liability of the White Star Co. to the Royal Mail Co. in respect of instalments due from the Royal Mail Co. to the Marine Co. was reduced to such sum as the Royal Mail Co. paid to the Marine Co., and, as nothing in respect of the instalments in question has been paid by the Royal Mail Co., the White Star Co. are under no liability for the sum of 2,444,000*l.* referred to in the letter of May 19, 1932.

F. R. Evershed K.C. and *Gordon Brown* for the respondents. Sect. 25 of the Companies Act, 1867, was almost constantly under consideration by the Court. While that section was in force, the shares need not be paid in cash if the same should have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies, and in that case any consideration accepted by the Company on the face of the contract as money's worth had to be taken as money's worth unless the contract was set aside. The White Star Co. cannot go behind the transaction expressed in the scheme of arrangement which they duly agreed to and by which deferred creditors' certificates of the nominal amount of the indebtedness were issued in respect of the calls on the shares of the White Star Co. held by the Royal Mail Co. The shares thereby became fully paid and are so shown in the balance sheet of the White Star Co. The Companies Act, 1929, s. 20, sub-s. 2, provides that any payment due from a member of a company to the company under the memorandum and articles is a specialty debt, and by s. 157 the liability of a contributory in a winding up is limited in the case of a shareholder to the amount "unpaid" on the shares held by them. The shares were not here "unpaid" when the winding up commenced. "Where "shares are paid up in kind, e.g., by a sale to the company "of property, which the company has agreed to take as "equivalent in value to the nominal amount of the shares . . . , "the shares must be treated as fully paid up unless either "the whole transaction can be impeached . . . . or it appears "on the face of the contract that the value agreed upon is in "fact less than the nominal amount of the shares, or the

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"alleged consideration is found to be non-existent or a mere "blind. The company will not, save in the cases above "excepted, inquire into the consideration or require proof "that the consideration is equivalent in cash value to the "nominal amount of the shares." Buckley on Companies, 11th ed., p. 109, and see *Ooregum Gold Mining Co. of India* v. *Roper, Walbroth & Roper* (1) and *In re Theatrical Trust, Ld., Chapman's Case* (2) a case where the liquidator of a company failed to show that the consideration for the issue of shares was illusory or was obviously less in value than the nominal value of the shares, with the result that the shareholder had his name removed from the list of contributories. Other cases bearing on the matter are *Pellatt's Case* (3) and *In re Almada and Tirito Co.* (4), where a company tried to issue shares at a discount. The case most directly in point here is *In re Wragg, Ld.* (5) It lays down that although a limited company cannot release a shareholder from the obligation to pay for his shares in money or money's worth, it can buy property at any price it thinks fit and pay for it in shares. The transaction is valid if the company has acted honestly and not colourably and has not been imposed on by the vendor. Liability on shares can be dealt with like any other specialty debt except for the limitation imposed by the fact that the debt is due to a statutory body which has no power to release a shareholder from his obligation until payment in money or money's worth. The market value of what is taken in payment of calls is immaterial, and the only question is the value put on it by the parties : see per Lindley L.J. in *In re Wragg, Ld.* (6) Here the company, acting honestly and with full knowledge of the facts, has accepted the deferred creditors' certificates in satisfaction of the call on the shares and the transaction must stand until it is impeached in separate proceedings. The statutory liability incident to the holding of shares may be satisfied by proof of payment or accord and satisfaction : see per Parker J. in *Gardner* v.

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(1) [1892] A. C. 125, 136, 139.
(2) [1895] 1 Ch. 771.
(3) L. R. 2 Ch. 527.
(4) 38 Ch. D. 415.
(5) [1897] 1 Ch. 796.
(6) Ibid. 829.

Iredale (1) stating the principle laid down in *Pellatt's Case* (2) and *In re Wragg, Ld.* (3); compare also *In re West Coast Gold Fields, Ld.* (4) It is contended, therefore, that there has been an accord and satisfaction, with the result that the shares held by the Royal Mail Co. must be treated as fully paid. There is no ground for saying that the transaction was ultra vires the White Star Co.

Alternatively, it is contended that there has been a set-off. It is true that it was decided under the Companies Act, 1862, that a shareholder in a limited company, who is also a creditor of the company under a contract, is not, in the event of the company being wound up, entitled to set off the debts due to him against the calls: *In re Overend, Gurney & Co., Grissell's Case.* (5) But the position was different when the contributory had become bankrupt, for then the debt was set off against the calls: *In re Duckworth* (6); *In re Universal Banking Corporation* (7); *In re G. E. B.* (8) The rule in bankruptcy was made applicable in the winding up of a company by s. 10 of the Judicature Act, 1875, now s. 262 of the Companies Act, 1929, and it follows that there is a right of set-off in the present case: see, however, *In re General Works Co., Gill's Case* (9); *In re Pyle Works* (10); *In re Washington Diamond Mining Co.* (11) There is a distinction between a call made before the winding up of a company, so that there is a specialty debt due before the winding up, and the case where a shareholder holds partly paid shares at the beginning of the winding up and the liquidator calls on him to pay the balance as a contributory. In the former case the matter comes within s. 31 of the Bankruptcy Act, 1914, which provides for a set off in cases of mutual dealings between a bankrupt and another person and by s. 10 of the Judicature Act, 1875, it was made applicable in a winding up. In *Grissell's Case* (5) the call was made by the liquidator before the passing of the Judicature Act, 1875: see *In re Breech-Loading Armoury Co.* (1)

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(1) [1912] 1 Ch. 700, 716.
(2) L. R. 2 Ch. 527.
(3) [1897] 1 Ch. 796.
(4) [1905] 1 Ch. 597.
(5) (1866) L. R. 1 Ch. 528.
(6) (1867) L. R. 2 Ch. 578.
(7) (1870) L. R. 5 Ch. 492.
(8) [1903] 2 K. B. 340.
(9) (1879) 12 Ch. D. 755.
(10) (1890) 44 Ch. D. 534.
(11) [1893] 3 Ch. 95.

[CLAUSON L.J. The principle of set-off might have applied if proceedings to recover a call had been brought before the commencement of the winding up.]

There is no ground for saying it does not apply in a case like the present. Sect. 247 of the Companies Act, 1929, does not suffice to prevent its applying. Other cases bearing on the matter are *In re Stranton Iron & Steel Co.* (2), *In re Whitehouse & Co.* (3), and *In re Auriferous Properties, Ld.* (*No.* 1). (4) So, too, s. 205 does not apply when the call was made before the winding up and the view once taken under s. 157 that the position of a liquidator enforcing calls, even when they were made before the winding up, was that he was acting in his own right is no longer accepted. Lastly, it is contended that as a result of the documents in the case the White Star Co. is estopped for saying that the shares in question were not fully paid. As regards the points raised by the appellants on the construction of the scheme of arrangement and on the construction of the letters of May 19 and 30, 1932, the view expressed by Bennett J. in his judgment really disposed of these points.

[They also referred to *Allen* v. *Gold Reefs of West Africa, Ld.* (5)]

Harman K.C. in reply. There is no right to set-off here. This is not a case where the White Star Co. are seeking to recover the amount of calls from the Royal Mail Co. It is the Royal Mail Co. that are seeking to prove in the winding up of the White Star Co., and it is a settled principle that the holder of partly paid shares cannot take anything in the winding up until he has paid the sum due on his shares: *In re Auriferous Properties, Ld.* (*No.* 2). (6) The ground is that the shareholder cannot receive a dividend on the company's indebtedness to him till he has paid the call on his shares in cash, and that is exactly the position in the present case: compare *In re National Live Stock Insurance*

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(1) (1868) L. R. 5 Eq. 214.
(2) (1875) L. R. 19 Eq. 449.
(3) (1878) 9 Ch. D. 595.
(4) [1898] 1 Ch. 691.
(5) [1900] 1 Ch. 656.
(6) [1898] 2 Ch. 428.

Co. (1) Sect. 31 of the Bankruptcy Act, 1914, has no application in such a case.

[ROMER L.J. That principle does not apply in bankruptcy because of s. 31, and if s. 31 is incorporated in the Companies Act, it does not apply to winding up.]

Set-off is only allowed when there is no provision for distribution pari passu and there can be no set-off where, as here, the liquidator is not seeking to recover the amount of the call: see *In re Whitehouse & Co.* (2); *In re General Works Co., Gill's Case.* (3)

Next, it is said that by accepting the scheme of arrangement the White Star Co. is estopped for saying that the shares are not fully paid.

[ROMER L.J. The Court does not wish to hear you on this point.]

Lastly, was what the company received in respect of the calls payment in full? That is really the question which arises after all the documents and authorities have been examined. The other side argued that the proper inference was that the directors of the White Star Co. thought they were getting full value, and that if so the Court could not go behind that. But the evidence shows that no such inference can be drawn and that every one knew that the Royal Mail Co. was an insolvent company which was being given a moratorium. The White Star Co. were rescuing what they could get out of the wreck. This case, therefore, is remote from such cases as *In re Wragg, Ld.* (4) The White Star Co. were not buying anything but accepted a promise to pay at a future date in place of a present liability and also accepted a lower rate of interest in the meanwhile. That is the sort of transaction which Lindley L.J. said was insufficient in *In re Wragg, Ld.* (4): see also *In re Almada and Tirito Co.* (5) There must be payment in full before the shares can be treated as fully paid. That is the only accord and satisfaction in respect of a call on shares that is admissible. The Royal Mail Co. are therefore

(1) [1917] 1 Ch. 628.
(2) 9 Ch. D. 595.
(3) 12 Ch. D. 755.
(4) [1897] 1 Ch. 796.
(5) 38 Ch. D. 415.

entitled to a dividend in respect of the debt owing from the White Star Co. only when the call on the shares has been paid.

Cur. adv. vult.

1938. Feb. 17. The judgment of the Court [Lord Romer, MacKinnon and Clauson L.JJ.] was read by Clauson L.J.

CLAUSON L.J. This is an application in the liquidation of the White Star Line, Ld., a company limited by shares, now in compulsory liquidation under an order of April 8, 1935. The object of the application is to ascertain what are the rights of the Royal Mail Steam Packet Co. (also a company limited by shares and in compulsory liquidation under an order of the Court of February 10, 1936) with regard to payment out of the assets of the White Star Co. of a very large sum, the bulk of which is admittedly due from the White Star Co. to the Royal Mail Co. The difficulty in the case arises from the fact that the Royal Mail Co. are and at all material times have been holders of a very large block of shares in the capital of the White Star Co., and it becomes necessary to determine the legal position of the Royal Mail Co. as holders of those shares, in view of the fact that the White Star Co. are in liquidation, and that their assets, apart at all events from such contributions to their funds as the liquidator is entitled to call on the shareholders to make, are insufficient to meet their liabilities.

Put quite shortly, the contention of the liquidator of the White Star Co. is that he is in a position to require a contribution from the Royal Mail Co. to the assets of the White Star Co. of 750,990*l.*, that sum, as he contends, being still unpaid on the shares held by the Royal Mail Co. in the White Star Co. He admits that if that contribution is made in full the Royal Mail Co. will be entitled to be paid a dividend in due course on a very large sum admittedly due to them.

The contra contention of the Royal Mail Co. is that there is nothing unpaid on the shares which they hold in the White

Star Co. If they establish this contention, it follows that, without making any contribution to the assets of the White Star Co. they will be entitled to be paid a dividend in due course on a sum of approximately two and a half millions subject to a set off of any crossclaim (there would, in fact, be a cross claim of upwards of a million) made by the White Star Co.

The first question is whether in the circumstances of the case the Royal Mail Co. are correct in their contention that there is nothing unpaid on the shares which they hold in the White Star Co.

At the end of the year 1931, the Royal Mail Co. held, and they still hold, 1,501,100 ordinary shares of 1*l.* each in the White Star Co. Up to the end of 1931, 14*s.* a share had been paid up on 1,000,000 of these shares, and 2*s.* had been paid up on 501,100 of these shares. The amount required to pay up the shares in full was accordingly at that date 750,990*l.* Calls had been made for the total amount unpaid on the shares, and accordingly the White Star Co. were specialty creditors of the Royal Mail Co. for the 750,990*l.* as well as for interest on the calls. The Royal Mail Co. contend that since January 1, 1932, the sum of 750,990*l.* has been paid up on the shares. They say, and it is admitted, that by a document of April 7, 1932, the White Star Co. agreed (subject to Eve J. confirming the scheme next mentioned) to be bound by a certain scheme of arrangement then proposed and subsequently confirmed by Eve J., the material provisions of the scheme being that the debts of the Royal Mail Co. should be satisfied by the issue to the respective creditors of deferred creditors' certificates of the nominal amount of their respective debts. The effect, as regards any ordinary creditor, of accepting certificates in accordance with the scheme was, to put it shortly, that his right to immediate payment of his debt was exchanged for a right to be paid the amount of it at an indefinitely postponed date, that the amount was to carry interest payable only out of certain profits, and that he obtained a certain measure of control as one of the whole body of certificate holders over

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the conduct of the business of the Royal Mail Co. The document of April 7, 1932, did not contain the whole of the terms agreed between the Royal Mail Co. and the White Star Co. It was supplemented by two letters exchanged between the two companies dated May 19, 1932, and May 30, 1932.

Before Bennett J. and before this Court, two quite separate points were raised with regard to the operation of the arrangement thus come to between the companies. In the first place it was said on behalf of the White Star Co. that, on the true construction of the document of April 7, 1932, and of the scheme, the specialty debt of £750,990 was not satisfied or discharged, but was merely postponed, a postponement which, in view of the supervening liquidation of the Royal Mail Co., would be immaterial for the purpose now in hand, and that accordingly, in the circumstances of the case, the arrangement made became ineffective, and the specialty debt remained a due and unpaid debt, and that accordingly the shares to the extent of the 750,990*l.* remained unpaid shares. The learned judge rejected this contention. The arguments in support of this contention are stated in detail in his judgment as are also his reasons for rejecting the contention. We can see no flaw in these reasons and we agree with him that this contention put forward on behalf of the White Star Co. fails.

The second point raised may be stated shortly as follows. It related not to the sum due from the Royal Mail Co. in respect of the shares held by the Royal Mail Co. in the White Star Co. but to the bulk of the sum claimed to be due from the White Star Co. to the Royal Mail Co. That claim arose thus. In the year 1926 the International Mercantile Marine Co. owned a block of shares in the Oceanic Co. These shares the Royal Mail Co. agreed to buy from the International Mercantile Marine Co. for a sum of seven millions payable by instalments. In 1927 the Royal Mail Co. resold the Oceanic shares to the White Star Co. for the same purchase price payable by like instalments to be paid by the White Star Co. to the Royal Mail Co., in each case, a day before the due date of the instalment payable by the Royal Mail Co. to the International Co. The bulk of the sum claimed to be due in the liquidation of the White Star Co. from that company to the Royal Mail Co. consisted of the balance of this purchase price. It was suggested on behalf of the White Star Co. that the effect of the letters was to reduce the liability of the White Star Co. from the instalment figure to such figure as the Royal Mail Co. should in fact pay to the International Co. in respect of the corresponding instalment. The Royal Mail Co. have, in fact, paid nothing in respect of that instalment to the International Co., and it was accordingly suggested that the Royal Mail Co. could not, rebus sic stantibus, claim the instalment from the White Star Co. The detailed circumstances material to this point and the arguments put forward are clearly stated in the learned judge's judgment, as also is his view that the argument has no foundation. We agree with his view and the reasons given for it, and we find it unnecessary to deal further with the point.

We accordingly agree with the learned judge that the intention of the parties to the arrangement into which they entered in 1932 was to discharge the specialty debt of 750,990*l.* for calls, and the transaction can be accurately stated as one under which the White Star Co. accepted the deferred creditors' certificates by way of accord and satisfaction of the amount due for calls, or, in other words, for the amount unpaid, on the shares held by the Royal Mail Co. in the White Star Co. The question which arises is whether the transaction is valid with the result that thereby 750,990*l.* was paid up on the shares. If the answer is yes, then, by reason of s. 157, sub-s. (*d*), of the Companies Act, 1929, the liquidator of the White Star Co. can make no further claim in respect of those shares, and his contention must fail. The White Star Co. is a company limited by shares, and by reason of s. 157 the liquidator cannot call on the Royal Mail Co. as shareholders to provide funds to meet the company's debts save to an amount equal to the amount unpaid on the shares held in the White Star Co. by the Royal Mail Co.

The reported authorities establish that a sum payable on a share held in a company limited by shares, in response to a call made while the company is a going concern, is effectually paid up, so as to protect the shareholder pro tanto from further liability on the share, if that sum is paid in money or money's worth; see per Lindley L.J. in *In re Wragg, Ld.* (1), and per Vaughan Williams L.J. in *Mosely* v. *Koffyfontein Mines, Ld.* (2); that a payment is an effective payment in money's worth if the consideration given by way of payment is something which is bona fide regarded by the parties to the payment as fairly representing the sum which the payment is to discharge; see per Lord Watson in *Ooregum Gold Mining Co. of India* v. *Roper, Walbroth & Roper* (3); but if the consideration given by way of payment is a mere blind or clearly colourable or illusory—see per A. L. Smith L.J. in *In re Wragg, Ld.* (4) —the so-called payment up is ineffectual for the purpose. The question whether the consideration is colourable is one of fact in each case: see per Vaughan Williams L.J. in *In re Innes & Co., Ld.* (5)

It was argued in the present case that the sum due on the calls made before 1932 was a specialty debt, that a specialty debt may be discharged by accord and satisfaction, and that the debt in the present case was so discharged. Reference was made to the language used by Lindley L.J. in *In re Wragg, Ld.* (6), where he said: "It has never been "doubted, so far as I know, that the obligation of every "shareholder in a limited company to pay to the company "the nominal amount of his shares could be satisfied by a "transaction which amounted to accord and satisfaction "or set off as distinguished from payment in cash." But it is necessary also to refer to a subsequent passage in the same judgment (7), where his Lordship said: "specialty "debts, like other debts, can be discharged in more ways "than one—e.g., by payment, set off, accord and satisfaction, and release." And it is significant that while he went on to point out that any mode of discharging a specialty debt is as available to a shareholder as to any other specialty debtor, he made the statement expressly subject to the qualification introduced by the doctrine of ultra vires, or, in other words, the doctrine of the limited capacity of statutory corporations. He pointed out that it is obviously beyond the power of a limited company, without receiving payment in money or money's worth, to release a shareholder from his obligation to pay up his shares.

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(1) [1897] 1 Ch. 796, 831.
(2) [1904] 2 Ch. 108, 114.
(3) [1892] A. C. 125, 136.
(4) [1897] 1 Ch. 796, 836.
(5) [1903] 2 Ch. 254, 262.
(6) [1897] 1 Ch. 796, 826.
(7) Ibid. 829.

In view of the principles to be deduced from the authorities it is clear that a discharge by accord and satisfaction of the specialty debt resulting from a call must be subject to the qualification that the consideration which is given by way of satisfaction must not be a mere blind or clearly colourable or illusory, and that the question whether it is so or not is one of fact, and the language of Lindley L.J. cannot, in our judgment, fairly be construed otherwise.

In *In re Wragg, Ld.* (1), A. L. Smith L.J. indicated the opinion (accepted as correct by counsel in argument in the present case) that if in a contract for payment up in money's worth a money value less than the face value of the sum to be paid up be placed on the consideration, the fact that the shares were not fully paid up in money or money's worth would be apparent on the face of the contract. It was, however, strenuously argued before this Court that, unless and until the contract is impeached in an independent action for that purpose, any consideration which, on the face of the contract, is accepted by the company as money's worth, must be taken as money's worth until the contract is set aside. We are not prepared to hold that, if the facts are sufficiently plain, the Court is bound to insist on what, after all, in such a case is a mere technical requirement—namely, that the contract for payment in what is represented as money's worth should be impeached in an independent action. If the true view of the contract in question is that the consideration accepted is a mere promise of deferred payment, with a liability for

(1) [1897] 1 Ch. 796.

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payment of interest in the meantime only out of contingent profits, it would seem obvious that the consideration is not "money's worth" to the amount of the sum for which the shareholder is immediately liable. The matter is, of course, not necessarily so clear if, as in the present case, an advantage is, by the bargain, given to the creditor company by way of a measure of control over the debtor's business being vested in the creditor company as part of the contract. But on a due consideration of the actual facts in the present case, we are satisfied that money's worth was not in fact given, or, to use alternative language, that the consideration was colourable or illusory in so far as it was represented as being of the value of 750,990*l.* The material evidence on this point stands as follows:

By letter of March 25, 1937, the liquidator of the Royal Mail Co. admitted, for the purposes of the present proceedings, that the deferred certificates issued by the Royal Mail Co. under the scheme were at all material times worth less than their nominal or face value, and further by letter of May 3, 1937, that to the knowledge of Sir William McClintock, the liquidator of the Royal Mail Co., who was a director of the Royal Mail Co. from October 20, 1932, to the date of liquidation, the deferred certificates were at all material times worth less than their nominal or face value. There is also before the Court an affidavit by Mr. Charlton, who was intimately concerned with the scheme and was from 1930 a director of the White Star Co., to the effect that the certificates were at all material times, and in particular at the time when the scheme was sanctioned by the Court, worth a great deal less than their nominal or face value. He adds that everyone with a knowledge of the affairs of the Royal Mail Co. realized, when the scheme was sanctioned and also when the certificates were issued, that it must be several years before the revenues of the Royal Mail Co. would be sufficient to permit any payment of interest on the certificates and the value of the certificates was, therefore, wholly speculative, and that the facts were well known to the directors of the White Star Co.

In our judgment it is possible to draw one inference only from these facts—namely, that the transaction was an acceptance by the White Star Co. of the deferred certificates, not as in any sense a payment for the 750,990*l.* due for calls on the shares, but as the best that could be saved out of the wreck of the Royal Mail Co.'s finances towards making some provision for compensation in the future for the failure of the Royal Mail Co. to provide a sum of 750,990*l.*, which they were unable in fact to pay. The transaction was in effect a release of the Royal Mail Co. from a liability which they could not meet at the time in consideration of a limited obligation undertaken by them which was and was understood by every one to be far less onerous than the obligation to pay 750,990*l.*, some control being given to the certificate holders over the future conduct of the Royal Mail Co.'s affairs. It is not, in our view, possible, as the authorities stand, to hold, on the facts, that such a transaction amounted to payment of 750,990*l.* in the sense in which the word "unpaid" is used in s. 157 of the Companies Act, 1929.

If the view above expressed be correct, it must follow that the Royal Mail Co. is to be treated as the holder of shares on which 750,990*l.* remains unpaid, and they have no answer to the claim of the liquidator of the White Star Co. that they are liable to pay the sum. True it is that if the liquidator claimed that sum in the liquidation of the Royal Mail Co. he might have to be content with his right of proof. He is, however, not claiming any right to share in the assets of the Royal Mail Co. All that he claims is that until the Royal Mail Co. (who are, as shareholders in the White Star Co., liable for the debts of the White Star Co. up to the limit imposed by the limited nature of the company) pay up this liability they cannot compete with other creditors of the White Star Co. against the funds of the White Star Co. available to meet the White Star Co.'s debts. That this must necessarily be so appears to follow from the decision in *In re Overend, Gurney & Co.; Grissell's Case* (1), a decision which is not only unimpeachable as a matter of reasoning, but is binding on this Court. It is suggested that the position was varied by s. 10 of the Judicature Act, 1875, now represented by s. 262 of the Companies Act, 1929. This Court could not so decide without overruling the decision of Bacon V.-C. in *In re General Works Co.*; *Gill's Case* (1), the decision of Fry J. in *In re West of England Bank* (2), and the decision of Wright J. in *In re Auriferous Properties, Ld.* (No. 2). (3) We see no flaw in the reasoning in those judgments, and we are not prepared to overrule them.

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(1) L. R. 1 Ch. 528.

We were given to understand in the course of the case that there is no question between the parties as to the figure of the proof which the liquidator of the Royal Mail Co. would be entitled to put in against the White Star Co. if and when he has paid up the 750,990*l.* in full. It is obvious that the liquidator of the White Star Co. cannot make any claim under the deferred creditors' certificates issued to the White Star Co. in view of the abortive nature of the arrangement intended to be made between the companies in the year 1932. The order of the learned judge admitted the proof of the Royal Mail Co. at a figure which gave effect to the cross-claim of the White Star Co. on the deferred creditors' certificates. The order of this Court will be to the following effect. The order of Bennett J. will be discharged, except in so far as it directed that an earlier proof sworn May 30, 1935, be expunged. The order will declare that the amounts unpaid on the shares held by the Royal Mail Co. in the White Star Co. are in the aggregate 750,990*l.* and that the Royal Mail Co. are entitled to prove in the liquidation for a figure which will be specified in the order, and will, we understand, be settled between the liquidators, and will be, or will approximate to, the figure of 2,742,942*l.* 6*s.* 3*d.* mentioned in the notice of appeal, but the order will further declare that the Royal Mail Co. are not to be entitled in respect of that proof to receive dividends in the winding up of the White Star Co., except on the footing of paying in cash such calls as may be duly made in the liquidation of the White Star Co. on the shares held by the Royal Mail Co. in the White Star Co. The liquidator of the Royal Mail Co. will be ordered to pay to the liquidator of the White Star Co. his taxed costs of the application by summons dated March 6, 1937, and of this appeal, and it would seem proper, subject to anything which the parties may wish to say on the point, that those costs should include the costs of the application by summons dated November 12, 1936.

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(1) 12 Ch. D. 755.

(2) (1879) 12 Ch. D. 823.

(3) [1898] 2 Ch. 428.

Leave to appeal to the House of Lords was granted.

Solicitors: *Linklaters & Paines; Stafford Clark & Co.*

H. C. G.

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In re ASHTON.

WESTMINSTER BANK *v.* FARLEY.

[1936. A. 1124.]

Charity—Will—Gifts to vicars and churchwardens of two named churches—"For parish work"—Validity of gifts—Intestacy.

A testatrix bequeathed the residue of her estate in equal shares to two charities and to the respective vicars and churchwardens of two named churches "for parish work":—

Held, by Luxmoore J. and the Court of Appeal (Sir Wilfrid Greene M.R. and Farwell J., Clauson L.J. dissenting), that it was impossible to find any substantial distinction between the phrase "for parish work" and the phrases "parochial activities" or "parochial purposes" which were considered by the Court of Appeal in *In re Bain* [1930] 1 Ch. 224 and in *In re Stratton* [1931] 1 Ch. 197 not to be charitable, and that the expression "parish work" could not as a matter of construction be read as equivalent to "church work," and that the gifts in question were not therefore charitable and consequently failed.

Dunne v. *Byrne* [1912] A. C. 407 followed.

ORIGINATING SUMMONS.

By her will dated August 16, 1933, Emma Mary Ashton, of Kensington in the county of London (hereinafter called "the testatrix"), after appointing the plaintiff bank sole executor and trustee thereof and after the devise and bequest of certain real and personal estate and the gift of certain pecuniary legacies free of duty gave and appointed every thing whereof she had power to dispose of by her will and whereof she had not thereinbefore effectively disposed of to her trustee upon trust to sell and convert the same into money and thereout to pay her debts and funeral and testamentary expenses and all death duties (including all legacy and succession duty payable in respect of her death upon anything passing under her will) and the cost of administering the trusts thereof "and to stand possessed "of the residue upon trust in equal shares for St. Clement's "Mission Notting Dale (of which my uncle Edmund Waller "was founder and which he and I have supported) for their "mission work the Society for the Propagation of the Gospel "in Foreign Parts the Vicar and Churchwardens of St.

"Columba's Church, Hoxton (for parish work), and the Vicar "and Churchwardens of St. Cuthbert's Church, Philbeach "Gardens, Kensington (for parish work)."

The testatrix died on March 19, 1935, and her will was proved on June 13, 1935, in the Principal Probate Registry of the High Court of Justice.

The defendants, the Rev. G. W. Farley and G. Hammersley, were the vicar and one of the churchwardens of St. Columba's Church, Hoxton, in the County of London, respectively. The office of the other churchwarden was at the date of the issue of the summons vacant. The defendants John M. Nicolle and John F. C. Carter were the churchwardens of St. Cuthbert's Church, Philbeach Gardens, Kensington; the Rev. F. G. Croom, who was the vicar of the said church at the date of the death of the testatrix having since died. A successor was, however, appointed on July 14, 1936.

It appeared from the evidence that at no time had there been a civil parish of St. Columba, and the parish of St. Columba, Kingsland Road, Hoxton, existed for ecclesiastical purposes only. It further appeared that the parish of St. Cuthbert (in which the Church of St. Cuthbert's, Philbeach Gardens, Kensington, was situate) was originally formed as a particular district under the provisions of the Church Building Acts, the district assigned to the said church being taken from the ecclesiastical parish of St. Philip, Earl's Court. By an instrument of the Ecclesiastical Commissioners dated November 24, 1887, the incumbent of St. Cuthbert was authorized to perform all church offices and he was given the fees arising from the performance of such offices as from the then next avoidance of the mother parish of St. Philip. This avoidance occurred soon afterwards. As from such avoidance the district of St. Cuthbert became by virtue of the New Parishes Act, 1856, s. 14, a separate and distinct parish for ecclesiastical purposes and the church of St. Cuthbert became the church of such new parish.

Doubts having arisen as to whether the gifts in the will to the respective defendants, the vicar and churchwardens of St. Columba's Church Hoxton (for parish work) and the

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vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens (for parish work), were valid charitable bequests, an originating summons was taken out by the executor of the testatrix's will for the determination (inter alia) of the following questions: (1.) Whether the gift of one fourth share of the net residue of the estate of the testatrix to the defendants, the Rev. G. W. Farley and G. Hammersley as vicar and churchwarden of St. Columba's Church, Hoxton aforesaid for parish work contained in the said will was a good charitable gift or whether the said gift failed and the said one fourth share passed as on the intestacy of the testatrix or how otherwise. (2.) Whether the gift of another one fourth share of the said net residue to the Rev. F. G. Croom (since deceased) and the defendants John M. Nicolle and John F. C. Carter as vicar and churchwardens of St. Cuthbert's Church aforesaid for parish work contained in the said will was a good charitable gift or whether the said gift failed and the said one fourth share passed as on the intestacy of the testatrix or how otherwise.

J. B. Richardson for the applicant.

J. M. Gover K.C. and *C. A. J. Bonner* for the Rev. G. W. Farley and G. Hammersley, the vicar and churchwarden of St. Columba's Church, Hoxton. The gift is one to the vicar and churchwardens, it is therefore given them in their capacity of holding an office and not as individuals; the words "for parish work" connote ecclesiastical purposes: see *In re Garrard.* (1) The nature of the parish, too, is material—it is an ecclesiastical parish. The only difficulty is caused by the words which the testatrix has inserted in the residuary gift "for parish work." It is submitted, however, that these words clearly show the gift was one of a religious and charitable nature.

If the gift is in any way ambiguous, then the character of the legatee who is to receive it, namely, his holding a religious office, is material to be considered; also the evidence produced showing the relationship between the testatrix and the vicar

(1) [1907] 1 Ch. 382.

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and churchwardens and her interest in the parish and evident desire that the gift should be used for charitable purposes: see *In re Rees* (1) per Sargant J. The Court can always look at the surrounding circumstances. "Parish work" here must mean work of the ecclesiastical entity, namely the parish of St. Columba's Church, Hoxton. If there is a doubt about the validity of this gift and one construction would enable it to be upheld, then the gift should be held valid: see Lord Hanworth M.R.'s remarks in *In re Bain.* (2) Here, looking at all the surrounding circumstances, "parish "work" must be the ordinary work of the vicar and churchwardens of this ecclesiastical entity, the parish.

The parish itself was created by an Order in Council in pursuance of the New Parishes Act, 1843. The effect of that Act was to create a new parish for ecclesiastical purposes. This Act was extended by the New Parishes Act, 1856. Therefore the vicar and churchwardens of this parish exist for spiritual and ecclesiastical purposes only, and a gift to them for "parish work" must be for work of a parish nature, and must be religious or charitable. It is immaterial what activities may be actually carried on in the parish or in connection with the church. The testatrix must be deemed to have meant by the phrase "parish work" work of an ecclesiastical or religious nature in this particular parish.

Also the collocation of the residuary gifts—some of course obviously charitable—is material: see *In re Knox.* (3)

The case of *In re Bain* (4) does not really apply to the present type of case, and *In re Stratton* (5) is distinguishable from the one now before the Court. In that case the word "church" is not mentioned at all. Here the word "parish" is not a geographical expression, but only as it concerns ecclesiastical purposes and the "work" is for that of spiritual officers. The gift is therefore one for a particular society or body established for ecclesiastical and spiritual purposes. It is a good charitable gift.

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(1) [1920] 2 Ch. 59, 62.
(2) [1930] 1 Ch. 224, 230.
(3) [1937] 1 Ch. 109, 113.
(4) [1930] 1 Ch. 224.
(5) [1931] 1 Ch. 197.

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H. B. Vaisey K.C. and *W. S. Wigglesworth* for the vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens, adopted the same line of argument.

In the case of this parish, it became a separate ecclesiastical parish by virtue of the Church Building Acts which are the same as the New Parishes Acts 1843 and 1856: see s. 14 of the latter Act. "Parish work" must mean "work" of a religious or charitable nature. There is a difference between "parochial interests" and "parish work." The duty of the vicar and churchwardens is one in furtherance of religion. The gift here is one for a particular kind of work, namely pastoral duties. *In re Stratton* (1) does not apply here. The duties of the vicar of a parish are territorial and exclusive. The gift is a good charitable bequest.

C. E. Harman K.C. and *R. W. Goff* for the next of kin of the testatrix. Though undoubtedly the testatrix may have intended a valid charitable bequest, she has not succeeded in creating a valid gift. Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (2) stated the modern meaning of "charity" in its legal sense, dividing it into four divisions. The wording here, "parish work," cannot, it is submitted, be brought within either of those heads, not even the last, "trusts for other purposes beneficial "to the community."

"Parish work" is very wide; it may include many activities connected with a parish, in no way charitable in the legal sense. It may mean "parish purposes" of any kind.

As regards the cases. *In re Rees* (3) does not assist the Court. The gift there was for "missionary purposes," but it was stated that the meaning could be narrowed by evidence of surrounding circumstances and this was accepted by the Court.

Another case where a residuary bequest to a Roman Catholic Archbishop as he thought "most conducive to "the good of religion in this diocese" was held not a good charitable bequest: see *Dunne* v. *Byrne.* (4) There this expression was held not to be identical with the expression

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(1) [1931] 1 Ch. 197.
(2) [1891] A. C. 531, 583.
(3) [1920] 2 Ch. 59.
(4) [1912] A. C. 407.

"for religious purposes." *In re Bain* (1) is, it is submitted, in our favour; it is, however, quite different from the case now before the Court. In the case of the gift here, at any time work might arise, not necessarily charitable or ecclesiastical and which the vicar and churchwardens could properly do. *In re Stratton* (2) is relied on. There the bequests were very similar to the gift here. That case really concludes the matter. See also *In re Jackson.* (3)

It is submitted that as a general principle, the work in a parish need not necessarily be charitable. All parish work is not always of a religious nature. The gift is void for uncertainty.

J. W. Brunyate (*A. Andrewes Uthwatt* with him) for the Attorney-General. The difficulty has arisen by the use of the word "work" after "parish." To the "parish" alone would have been a good charitable gift. Here "parish work" may be work not only locally carried on but work elsewhere for the benefit of the parish. He referred to *In re Smith* (4), especially the remarks of Lord Hanworth M.R. It might be possible for a scheme to be settled.

Luxmoore J. The summons raises the question whether the last two of the gifts in the residuary bequest contained in the will of the testatrix are charitable. If they are not, it is I think admitted that both of these gifts would fail for uncertainty and the two shares of the residue would pass as on an intestacy.

A number of authorities were cited to me in the argument and it is not easy to reconcile all of them one with another. I think however that the principle which emerges is that in order to create a good charitable gift its object must either be a specific charitable purpose or for general purposes which are confined to those which are in law charitable, to the exclusion of any purpose which is not in law charitable.

It was said in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (5) that charity in the legal sense comprises four principal divisions. Those are (*a*) the relief of poverty, (*b*) the advancement of education, (*c*) the advancement of religion and (*d*) trusts for other purposes beneficial to the community not falling under any of the three preceding heads.

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(1) [1930] 1 Ch. 224.

(2) [1930] 2 Ch. 151; [1931] 1 Ch. 197.

(3) [1930] 2 Ch. 389.

(4) [1932] 1 Ch. 153, 158, 162.

(5) [1891] A. C. 531, 583.

It is argued in the present case that the gifts in question are valid on two alternative grounds. First, it is said that the trusts on the true construction of the will are confined to religious purposes. Secondly, that they are for the benefit of all the inhabitants of the particular parishes referred to. To deal with the second ground first, it is well settled that a gift for the benefit of a particular parish is valid because it is for a specific public purpose. One of the earliest of the reported decisions to this effect is the case of the *Attorney General* v. *Lonsdale*. (1) In that case the gift was for some purpose conducing to the good of the county of Westmoreland and the parish of Lowther especially. Can the gifts in the present case be brought within that principle? They can only be so brought if on the true construction of the will the gifts are for the benefit of the inhabitants of the particular parishes generally. They cannot be valid if they are for the benefit of some section only of the inhabitants of the parishes, not falling within either of the several divisions to which I have already referred. The gift in each case is to the vicar and churchwardens of the particular church "for parish "work." The gifts are obviously made to the persons named in respect of the offices held by them and must I think be confined to "parish work" in connection with the particular churches named.

Notwithstanding the arguments of Mr. Gover and Mr. Vaisey on behalf of the respective vicars and churchwardens, I do not think the fact that the church is, in each case, that of an ecclesiastical parish as contrasted with the church of a civil parish makes any substantial difference in construing the gifts. In my judgment the gifts cannot be construed as being for the benefit of all the inhabitants of the geographical area included in the bounds of the

(1) (1827) 1 Sim. 105.

ecclesiastical parishes defined by the reference to the churches of those parishes.

It is therefore necessary to consider whether the gifts to the vicar and churchwardens of the particular churches for " parish work " can on the true construction of the will be confined to parish work of a religious nature. There is no other context in the will which can afford any assistance in construing the gifts ; nor is there any admissible evidence of surrounding circumstances which is material to be considered. There are only two points to be considered in construing the gift. One is that the gift is to the vicar and churchwardens of the particular church, and the other is that the gift is expressed to be for " parish work."

If the gift had been merely to the vicar and churchwardens of the particular church, the case would I think have fallen within the decision of Joyce J. in *In re Garrard.* (1) In the absence of words purporting to define or limit the objects to which the gifts were to be applied, Joyce J. held that the charitable purpose of the offices of the donees prevailed and confined the gift to religious, that is ecclesiastical, purposes in the parish.

In the present case the objects to which the gifts are to be applied are specifically defined as " parish work." It is said that this must necessarily be a religious or ecclesiastical purpose, for it is work to be done by the officers of the church in their official capacity and must in substance be construed as synonymous with church work. It was sought on those grounds to distinguish " parish work " from " parochial activities or parochial purpose," phrases used by Lord Hanworth and Lawrence L.J. in the case of *In re Bain.* (2) In that case the testatrix gave all her residue to the vicar of St. Alban's Church, Brooke Street, Holborn, E.C., for such objects connected with the church as he should think fit. The majority of the Court overruled the decision of Eve J. and held that the bequest was a valid charitable bequest. Russell L.J. dissented.

Lord Hanworth M.R. said in the course of his judgment :

(1) [1907] 1 Ch. 382.

(2) [1930] 1 Ch. 224, 232, 234.

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"'It appears to me that the words 'such objects connected "'with the Church,' that is the Church of St. Alban's, are "to be interpreted narrowly or rather, perhaps, as relating "to the church in contradistinction to relating to the parish; "and it is not disputed that if the objects were confined "to the support of the church, its fabric and its services, that "would be a good charitable bequest. I see no reason to "import into 'objects connected with the Church' parochial "activities which would embarrass our interpretation as "against an interpretation connecting the use of the funds "to the specific church indicated of which the recipient is the "Vicar. I have come to the conclusion that if we were to "give a loose interpretation to the words 'objects connected "'with the Church' we should be violating the rule which "requires us to make an effort to give an effective interpretation to the testatrix's words; and I also think that we "should be importing from outside something into those "words which they do not necessarily convey. It is because "we have got the church as the centre of this bequest and "not the parish that I think we are right in rejecting outside "considerations and in saying that this is a good bequest to "the Vicar as a trustee for the purposes of his church, that is, for "the fabric and for the services which are conducted therein."

It appears to me that if the words used by the testatrix in *In re Bain* (1) had been "objects connected with the parish," instead of "objects connected with the church" Lord Hanworth would have held the gift to be invalid.

I think the same view is expressed in the judgment of Lawrence L.J., where he says: "The question then arises, "there being here a gift which is prima facie a bequest solely "for charitable purposes, whether the addition of the words "'for such objects connected with the church as he shall "'think fit' operates to convert the gift into a bequest for "purposes which include non-charitable purposes. The "answer to that question depends upon the true meaning "of the words 'objects connected with the church.' I read "the additional words as meaning 'for such church purposes

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(1) [1930] 1 Ch. 224, 232, 234.

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"'in connection with St. Alban's Church as the vicar shall "'think fit.' The discretion vested in the vicar is in my "judgment limited to directing the mode of application of "the bequest within the scope of the indicated church "purposes, which are described as 'objects connected with "'the church.' The cases where the gifts were for purposes "conducive to the good of a religion or to the good of a "particular church are in my opinion distinguishable from "the present case. Here the words, to my mind, are apt "and proper to describe objects which are directly connected "with the church in contradistinction to objects which are only "conducive to the welfare of the parishioners, or to the con-"gregation who attend the church; and I think that the words "in question do not have the operation of extending and thus "defeating the primary gift to the ecclesiastical body."

"Parish work" is in my judgment of wider import than the phrase "objects connected with the church," which was present in the will in *In re Bain.* (1) It is, in my judgment, impossible to find any substantial distinction between the phrase "parish work" and the phrases "parochial "activities" or "parochial purposes," referred to in the judgments in *In re Bain.* (1)

In *In re Stratton* (2) a testatrix bequeathed part of the proceeds of sale of a house and a sum of money to the vicar for the time being of the parish of Mortlake, "to be by "him distributed at his discretion among such parochial "institutions or purposes as he shall select." Bennett J. held that the words "parochial institutions or purposes" might include objects which were not charities, and that the gifts were therefore invalid. That decision was affirmed by the Court of Appeal under the title *In re Stratton; Knapman* v. *Attorney-General.* (3) Lord Hanworth M.R. said in the course of his judgment: "It is not without "significance that the words of the gifts are 'among such "'parochial institutions or purposes as he shall select,' and "the attention of the Court has been directed to the various

(1) [1930] 1 Ch. 224.
(2) [1930] 2 Ch. 151.
(3) [1931] 1 Ch. 197, 200.

"parochial activities which are shown in the parish magazine, "and which are doubtless very excellent in themselves. But "the words of the codicils impose no restriction upon the "activities to which the trust moneys might be applied nor "is the vicar's discretion in any way limited. The only "condition is that what is done shall have something to "do with the parish; that might be something to do with "the church or it might not. In law it is not every parochial "purpose which is a charity. Many objects are commonly "called charitable, but if they are merely benevolent, or "humanitarian, then, however excellent they may be, they "are not necessarily charitable in the legal sense. Where in "these codicils are there any words to be found restricting "the powers of the vicar to purposes deemed by law to be "charitable? We can find none."

In the present case the object of the gifts is, as I have already stated, "parish work." I cannot as a matter of construction read this as equivalent to church work, and although I have come to this conclusion with regret, I am satisfied that I must hold that the gifts in this case are not charitable, and that to hold otherwise would be to disregard the decisions of the Court of Appeal in *In re Bain* (1) and *In re Stratton.* (2)

I therefore answer the questions raised by paras. 1 and 2 of the summons by declaring that neither gift is a good charitable gift; and that the gifts therefore fail and the one-fourth share of residue in each case passes as on an intestacy. The costs of all parties as between solicitor and client must come out of residue.

A. R. LL.-T.

C. A. The vicars and churchwardens of both parishes appealed. The appeal was heard on February 21 and 22, 1938.

H. B. Vaisey K.C. and *W. S. Wigglesworth* for the vicars and churchwardens of the two parishes.

Sir Terence O'Connor S.-G. and *Andrewes Uthwatt* for the Attorney-General.

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(1) [1930] 1 Ch. 224. (2) [1930] 2 Ch. 151; [1931] 1 Ch. 197.

Charles Harman K.C. and *R. W. Goff* for the next of kin.

The arguments used in the Court below were substantially repeated.

SIR WILFRID GREENE M.R. I should be happy if I could find my way to decide this appeal in a way different from that in which it was decided by the learned judge; but I do not find myself able, consistently with well-known principles and what I conceive to be the true construction of the gifts in question, to take that course. Ordinarily, I should have been content to say that I agreed with the judgment of the learned judge for the reasons which he gave, but in view of the fact that the members of the Court are not in unanimity as to the decision in this case, and in deference to the able argument which we have heard, I will express my opinion in my own language.

The gifts in question are two gifts contained in the will of Miss Emma Mary Ashton in the following language: "I "give and appoint"—and then she describes her residue with a trust for sale and she directs the trustees to stand possessed of the residue "upon trust in equal shares for St. Clement's "Mission, Notting Dale . . . . for their mission work, The "Society for the Propagation of the Gospel in Foreign Parts, "the vicar and churchwardens of St. Columba Church, "Hoxton (for parish work) and the vicar and churchwardens "of St. Cuthbert Church, Philbeach Gardens, Kensington "(for parish work)." It is with the last two gifts that we are concerned. The value of them, we are told, is something like 12,000*l.* each.

The principles applicable to this class of question are not, I think, susceptible of dispute. If upon the true construction of this gift it would be competent to the trustees named to apply portions of the trust property for purposes which are not charitable, the trust would be bad. If, on the other hand, according to the true construction of the gift, the powers of the trustees to apply the funds are limited to charitable purposes, the gift will be good.

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In the present case Luxmoore J. has held that the purpose named for which the gift is applicable—namely, for parish work, is such as to include, as a matter of construction, activities which are not charitable in the legal sense. It is argued by Mr. Vaisey with, if he will allow me to say so, great ability, that the words "for parish work," when taken in conjunction with the character and offices of the trustees—namely, the vicar and churchwardens, must be read in a limited sense and must be limited to ecclesiastical purposes falling within the functions which the vicar, with the assistance and support of the churchwardens, is bound to perform.

There is one argument with which I will deal quite shortly in order to get it out of the way, and that is this. These two parishes are both new parishes and the parish, in each case, exists for ecclesiastical purposes only, and not for any civil purposes. It is suggested that that circumstance has some bearing when taken in connection with the words that are used, because it is said that the nature of the parishes being what I have stated, the duties of the vicar and churchwardens are, of course, purely ecclesiastical and the object of the parish is an ecclesiastical object and nothing else. I am unable myself to attach any importance to the fact that these are new parishes. It seems to me that the words "parish work" must be construed without reference to that circumstance at all. I cannot bring myself to believe that that external fact was one which the testatrix here had in contemplation; and it would be a very curious result if precisely similar words had one result in the case of an old parish, and a totally different result in the case of a new one. I therefore put that argument on one side.

I agree that if the words could be construed in the way in which Mr. Vaisey would have us construe them, he would be entitled to succeed, but I find myself quite unable to construe them in that way. First of all, I do not think it is legitimate to cut down the purposes which are specified by reference to the character of the trustees. That is a rule that has been enunciated more than once. The passage in which it is most frequently quoted is the passage in the

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judgment of the Privy Council in *Dunne* v. *Byrne* (1), delivered by Lord Macnaghten, where he says: " A similar "argument was advanced and rejected in the Court of Appeal "in England in the case of *In re Davidson.* (2) It is difficult "to see on what principle a trust expressed in plain language, "whether the words used be sufficient or insufficient to satisfy "the requirements of the law, can be modified or limited in "its scope by reference to the position or character of the "trustee." I quite agree that Lord Macnaghten there is referring to a trust expressed in plain language, and he certainly did not mean to suggest that the character of the trustee is a thing which is to be disregarded in construing the gift as a whole. I can well conceive of cases where the purpose named takes its colour from the character of the trustee, but where you find that there is plain language it is not legitimate to cut that language down by reference to the fact that the trustees named hold a particular office, or have a particular character.

To my mind, the whole question in this case turns on whether or not the words " for parish work " can in some way be limited, either by their own inherent meaning or by reference to the character and quality of the trustees. I have come to the conclusion, and I do so with regret, that that limitation cannot be imposed upon the words. It seems to me that the words " for parish work " are of a very wide character and embrace not merely those limited functions in the parish which it is the duty of the vicar to perform, or those limited functions in the parish which it is the duty of the churchwardens to perform; nor can I limit those words by narrowing them down to religious purposes in the strictly charitable sense. It appears to me that, taking them as words of ordinary English, they cover any activity in the parish, any work in the parish which trustees of that character may be expected to perform, whether that work be strictly a religious purpose or strictly a charitable purpose, or whether it be a work considered to be conducive to the good of religion, or considered to be benevolent or generally

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(1) [1912] A. C. 407, 410.

(2) [1909] 1 Ch. 567.

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useful to the inhabitants of the parish or the congregation of the church. It seems to me that the words " for parish " work " cannot be cut down or limited, either by construing them in isolation, or by reference to the character of the trustees. There is in truth no joint function of the vicar and churchwardens, in the sense that there is something specific which they are both under a duty to do. It is perfectly true that, as a body, they are concerned in different directions and with different duties in the conduct of the religious activities of the church. But they are the most convenient trustees for any benevolently minded person to choose who is minded to select trustees in whose hands money will be placed for general activities in the parish, the kind of activities which you would expect to find carried out by such persons without any necessary limitation to charitable purposes but covering general benevolent, social and other purposes which are commonly carried on in parishes. We have ample authority for the proposition that activities of that kind, however estimable they may be, even though they may be conducive to the good of religion, will not be charitable. The first passage to which I would like to refer is another passage from the judgment of the Privy Council in *Dunne* v. *Byrne* (1), in which Lord Macnaghten says this: " It can hardly be "disputed that a thing may be ' conducive,' and in particular "circumstances, ' most conducive,' to the good of religion in "a particular diocese or in a particular district without being "charitable in the sense which the Court attaches to the "word, and indeed without being in itself in any sense "religious." I cannot myself find that under the words " for "parish work " the trustees would be bound to avoid engaging in activities conducive to religion, but not strictly charitable. Under those words, it seems to me, they could for example do anything conducive to the good of religion. But once that is said, the case is at an end because, as Lord Macnaghten points out, there are activities of that description which are not, and cannot be, described as charitable.

The only other cases to which I think I need refer are, first, *In re Bain.* (1) That was a case in which the gift was a gift to the vicar of a particular church "for such objects "connected with the church as he shall think fit." The majority of this Court in that case held that that was a good charitable gift, but it is important to observe what construction they placed upon it. They placed upon the words "such objects connected with the church as he shall think "fit" a very narrow construction, which limited those words to the purposes of the church, that is, for the fabric and for the services which are conducted therein. Nobody could suggest, and, indeed, it is not suggested, that the words here "for parish work" can have such a limitation placed upon them. But it is to be observed that both Lord Hanworth and Lawrence L.J. who formed the majority of the Court in that case, drew a very clear distinction between the church objects in the limited sense with which they were dealing there, and parochial objects, in the broader sense of activities of the vicar in the parish, because it is to be noticed that it was the activities of the vicar that were under discussion in that case. Lord Hanworth says (2): "I quite agree that "if one allows one's mind to play over the objects which are "parochial and illustrative of wide activities, such as are "common to a great number of parishes, a loose interpretation "can be given to these words embracing activities which "could not be properly considered religious, and therefore an "interpretation covering such a wide field as to prevent the "bequest standing good." What that means is this, that if the words had been "unto the vicar for such objects "connected with the parish as he should think fit," the Master of the Rolls would have decided the case the other way, and so would Lawrence L.J., as appears from his judgment. But precisely the same argument would have been available in that case, because it would have been said: "Here is a "gift to the vicar. The duties of the vicar are religious. He "must therefore confine the application of this money to "purely religious objects." It is quite clear that the majority of the Court of Appeal were not taking that view in that case. Then Lord Hanworth goes on: "I see no reason to "import into 'objects connected with the church' parochial "activities which would embarrass our interpretation as "against an interpretation connecting the use of the funds "to the specific church indicated of which the recipient is "the vicar." Lawrence L.J. (1) says this: "The cases "where the gifts were for purposes conducive to the good "of a religion or to the good of a particular church are in "my opinion distinguishable from the present case. Here "the words, to my mind, are apt and proper to describe "objects which are directly connected with the church in "contradistinction to objects which are only conducive to "the welfare of the parishioners, or to the congregation who "attend the church."

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(1) [1912] A. C. 407.

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(1) [1930] 1 Ch. 1, 224.

(2) Ibid. 232.

In the present case it seems to me that the words "for "parish work" are wide enough to cover activities which are conducive to the welfare of the parishioners or conducive to the welfare of the congregation who attend the church and are not to be limited to strictly ecclesiastical and religious purposes.

The other case is *In re Stratton.* (2) That was a case where the gift was a gift to the vicar for the time being of a particular parish "to be by him distributed at his discretion among "such parochial institutions or purposes as he shall select." It was said there by Lord Hanworth (3): "But the words "of the codicils impose no restriction upon the activities to "which the trust moneys might be applied nor is the vicar's "discretion in any way limited. The only condition is that "what is done shall have something to do with the parish; "that might be something to do with the church or it might "not. In law it is not every parochial purpose which is a "charity. Many objects are commonly called charitable, "but if they are merely benevolent, or humanitarian, then, "however excellent they may be, they are not necessarily "charitable in the legal sense." In the present case it is perfectly true that the words are not "parochial institutions

(1) [1930] 1 Ch. 234.
(2) [1931] 1 Ch. 197.
(3) Ibid. 200.

"or purposes," but are "parish work"; but with all respect to those who think otherwise, I cannot help thinking that that is a distinction without difference. The expression "parish work" appears to me, at any rate, to cover parish purposes, and parish purposes must cover things which are benevolent or humanitarian which, while conducive in a long view to the good of religion, cannot be called religious purposes within the meaning of the authorities. As I say, I come to this conclusion with regret, but I find the principles which are to be applied, and the language of the gifts, too compelling to enable me to come to a different one, and in my opinion this appeal must be dismissed.

CLAUSON L.J. I feel a natural diffidence in putting forward an opinion which differs from that expressed by the Master of the Rolls and will be found, I understand, to differ from that to be expressed by my brother Farwell; but I have formed a clear view as to the construction in this particular will of this particular lady of the very few words which it is the duty of this Court to construe.

I will first premise this, that it is well settled law that a gift to "the vicar for the time being of A" is not a gift to him for his own use, but is a gift to him for ecclesiastical purposes connected with his benefice. Further, it is to be observed that in the year 1907 Joyce J., in *In re Garrard* (1), after referring to the authorities which establish the proposition which I have just stated, held that a gift "to the vicar and "churchwardens for the time being of Kington to be applied "by them in such manner as they shall in their sole discretion "think fit" was a good charitable gift for ecclesiastical purposes in the parish. He said (2): "Having regard to the decision "of Vice-Chancellor Kindersley in *Thornber* v. *Wilson* (3), "and see *In re Delany* (4), it is clear that a legacy to the "vicar for the time being of a parish is a charitable gift "for the benefit of the parish for ecclesiastical purposes.

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(1) [1907] 1 Ch. 382.
(2) Ibid. 384.
(3) (1855) 3 Drew. 245; (1858) 4 Drew. 350.
(4) [1902] 2 Ch. 642, 646.

"The churchwardens are the officers of the parish in "ecclesiastical matters, so that a mere gift or legacy to the "vicar and churchwardens for the time being of a parish, "without more, is a gift or charitable legacy to them for "ecclesiastical purposes in the parish."

With these observations I turn to this particular will, premising this, that it has to do with two ecclesiastical districts, one the parish or ecclesiastical district of St. Columba's Church, Hoxton, and the other the parish or ecclesiastical district of St. Cuthbert, Philbeach Gardens, Kensington. It should perhaps be mentioned—I agree with the Master of the Rolls that it is a very small point in the circumstances—that it happens that these two parishes are, for no purpose whatever, civil parishes. They are parishes which were organized under the New Parishes Act, 1843, and are purely ecclesiastical districts; so that the parish of St. Columba, Hoxton, and the parish of St. Cuthbert, Philbeach Gardens, are districts, the official character of which arises from the fact that they are the districts within which the minister or incumbent of those respective churches has the cure of souls. That will be found to be the case on reference to the New Parishes Act, 1843. I do not myself attach very much importance to the point for this reason: It is true that under modern legislation—when I say modern, it dates to the Tudor period; it is comparatively modern having regard to the existence of parishes—parishes have a certain civil aspect and the incumbents of some parishes had certain civil duties as, for example, in the case of certain London and other parishes with select vestries, in which the vicar for the time being was chairman of the vestry, which mainly had civil duties to perform. In the same way, churchwardens from time to time have had imposed upon them certain civil duties; but it happens that the churchwardens in the cases of these particular churches, under the very Act which set up the parishes in question, have ecclesiastical duties only. However, I do not attach much importance to the point for this reason, that prima facie I should have thought that a reference to the vicar and churchwardens in a will which gives to them a gift as vicar and churchwardens of the parish would be primarily to them in the capacity of ecclesiastical officers.

The words of the will are these: The lady gives her residue to trustees upon trust to stand possessed " in equal shares "for St. Clement's Mission, Notting Dale . . . . for their "mission work "—I do not understand any question is raised in this case, but that that is a perfectly good charitable gift. Then, secondly, " The Society for the Propagation of the "Gospel in Foreign Parts "—that, again, no one will doubt is a perfectly good charitable gift. Thirdly, " The vicar and "churchwardens of St. Columba's Church, Hoxton (for parish "work) and the vicar and churchwardens of St. Cuthbert's "Church, Philbeach Gardens, Kensington (for parish work)." The question is, in each case: What is the meaning of the gift to the vicar and churchwardens named for parish work?

It seems to me material to bear in mind that the functions of the vicar of the church can be summed up in this, that he has the cure of souls in the particular district, parish or ecclesiastical district which is the locus of his benefice. The churchwardens, as I have said, have certain ecclesiastical and, in these particular districts, entirely ecclesiastical, duties to perform, which possibly, to some slight extent, overlap those of the vicar, in the sense that they may possibly have some sort of duty to assist him in relation to the cure of souls, but their primary function is no doubt to deal with more material matters, the fabric of the church, and so forth. The gift is to them for parish work, but in the context I feel driven to the conclusion that " for parish work " means "for their parish work." If a man has a particular function and you give to him, under the title of the office which involves that particular function, a gift for some work, prima facie, it would be for the work which he has to perform by reason of the office he fills; and I feel no difficulty in so construing these words, construing them, that is to say, as a gift to the vicar and churchwardens for their parish work, they being ecclesiastical officers of this parish.

I think it would be agreed that if I am right in so construing the words, and if the gift is for the parish work of the vicar and churchwardens, that is to say, to finance the vicar in the various multifarious duties which are covered by his duty to care for the souls of his parishioners—what is legally termed for the cure of souls—and to finance the churchwardens in their duties, of furnishing proper ornaments for the church and keeping the church in repair, it would seem reasonably clear, I should have thought, that the gifts came well within the strict legal definition of "charity," because they are gifts for a religious purpose, aimed at the religious edification and instruction of the parishioners, and the provision of the material means in the shape of church ornaments and so forth, for attaining the end of performing divine service, as ordained by the law of the church, in order to perfect the edification and instruction of the parishioners. The difficulty I feel in the case—and indeed it is a real difficulty—is that, taking the view I do of those words, I feel the gravest doubt whether, had I been sitting in the Court of Appeal in *In re Stratton* (1), I should have felt able to give to the words used in that case, which were, however, different words, the meaning which the members of the Court of Appeal, according to the reported decision, gave to those words. But remembering exhortations from the highest quarters that the worst thing one can do is to construe one set of words in a will by the meaning given to another set of words in another will, I feel bound, notwithstanding that decision, to hold that the construction I have stated of the words in this will is the correct one.

FARWELL J. I agree with the judgment of the Master of the Rolls.

The question is one of construction of a few words in the will of Miss Emma Mary Ashton. The gift is a gift of a portion of the residuary estate of the lady to "the vicar "and churchwardens of St. Columba's Church, Hoxton (for "parish work) and the vicar and churchwardens of St. "Cuthbert's Church, Philbeach Gardens, Kensington (for

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(1) [1931] 1 Ch. 197.

"parish work)." The question is whether those gifts are good gifts or not.

There is, of course, no question here of the rule against perpetuities. The gifts, if they are not good, are bad, because they are too vague; they are void for uncertainty. The question is whether the words can be so construed as to prevent them being void for uncertainty. When one looks at the gifts, this, at any rate, is plain that the vicar and the churchwardens in each case are not given this share of residue beneficially; they take as trustees and not otherwise. That being so, one looks to see whether the trust or the purpose for which they are given the money is defined in the will. It may be that if there was no definition of the purpose for which the money was to be used, it might be possible, as in the case of *In re Garrard* (1), to imply the trusts from the office of the trustees. In this case that is not the position, because here the purposes for which they are to take the money and to apply it is in each case for parish work. If the trust is a trust for parish work, then, in my judgment, it is not permissible to cut down the ordinary meaning of those words " parish work " by reference to the offices held by the trustees. It is only, in my judgment, in a case where the trust itself is not specified that the office of the trustees may be considered, in order, if possible, to ascertain the purpose of the trust. In this case, the trust is declared as being for parish work, and unless it is limited in a way in which, in my judgment, this Court cannot limit it, the words " for parish work " must be given their ordinary meaning. In my judgment, " parish work " means that which is sometimes compendiously called " good works " in the particular parish; that is to say, the various activities which the vicar and churchwardens promote and carry on in the parish for the good of the parishioners not only for their religious good but for their good generally, some of which, although benevolent, are not charitable in the strict sense of the word. The moment one gets to that position, that the vicar and churchwardens are to hold this money

(1) [1907] 1 Ch. 382.

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upon trusts, some of which are not strictly charitable, the gift must fail because it is void for uncertainty. In this case, if the vicar and churchwardens were to apply the money for some purpose, however benevolent, which was not strictly charitable, I cannot myself see that they would be committing any breach of trust, or that the Attorney-General would be entitled to move the Court to restrain them from so using the money. The moment you get to that position, it follows from a long line of authorities that the gift is void for uncertainty, and the conclusion to which Luxmoore J. came with regret, and to which I also come with regret, that the gift fails, is, in my judgment, the right one.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Thomas Eggar & Son; Field, Roscoe & Co.; Ravenscroft, Woodward & Co.; Treasury Solicitor.*

W. I. C.

BROUGHTON *v.* SNOOK.

FARWELL J.

1937 Dec. 15, 16, 17.

[1937. B. 1997.]

Vendor and purchaser—Action for specific performance of oral contract—Plea by executors of vendor of s. 40 *of Law of Property Act*, 1925—*Part performance—Purchaser in possession as tenant—Expenditure on property—Acts necessarily referable to contract—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.

In April, 1935, B. verbally agreed with S. to purchase a freehold inn. The purchase was to be completed on December 31, 1936, and in the meantime the tenant then in possession was not to be disturbed. In October, 1936, by arrangement with the tenant and with the consent of S., B. went into possession of the inn and to the knowledge of S. made considerable alterations and improvements, expending nearly 200*l.* In March, 1937, S. died and his executors offered the inn for sale. B. claimed specific performance of the oral agreement. The defendants pleaded s. 40 of the Law of Property Act, 1925:—

Held, that though the entry of B. might be referable to his agreement with the tenant, the other acts of B. done with the knowledge of S. amounted to part performance of the verbal contract. They were necessarily referable to the contract, since the existence of the contract was the only reasonable explanation of the acts in question, and they did not cease to be so because some ingenious mind might suggest that the acts in question might have been done by B. as an assignee of the tenancy, of which two months only remained unexpired.

WITNESS ACTION.

The following facts are taken from the judgment:—

The plaintiff in the action was seeking for specific performance of an alleged oral contract made in April, 1935, between himself, the plaintiff, and one Mr. Snook. Mr. Snook since the date of the contract had died and the defendants were his executors. One of the defences to the action was s. 40 of the Law of Property Act, 1925. In answer to that plea the plaintiff relied upon certain acts and things done which he contended were sufficient to take the case out of the defence of the statute.

In 1935 Mr. Snook was a man of considerable age, in the late seventies, and he was the owner in fee simple of an inn known as the Bridge Inn at Calver in the county of Derby. Mr. Snook had purchased the freehold of that property some years before and he had subsequently let it on a lease to a brewery company. The lease was a lease at a yearly rent of 150*l.* and expired on December 31, 1936. The price which Mr. Snook had paid for the inn when he purchased it was the sum of 3900*l.* The brewery company let the inn to a quarterly tenant, and in 1935 it was let on a quarterly tenancy to one Heathcote at a yearly rent of 40*l.* Heathcote was the licensee and was in possession of the inn as tenant of the brewery company. The plaintiff in 1935 had for some ten years been the licensee and occupier of the Museum Hotel in Sheffield. That hotel was a flourishing business. In 1935 the plaintiff was anxious to find a smaller inn or hotel in the country where he could earn some money, and could live in the country instead of living in the town, and he heard that there was a possibility that Mr. Snook might be willing to sell the Bridge Inn. The Bridge Inn was well known to the plaintiff. His wife had relations living in the neighbourhood of the Bridge Inn and he frequently passed it; he knew it well and he thought it was the sort of property which would suit him if he could buy it. Mr. Snook was a man well known in the neighbourhood and much respected, and although the plaintiff himself did not know him he knew of persons who did know him and who could give him an introduction, and he approached a Mr. Nadin, who was known to Mr. Snook, with a view to getting an introduction. Mr. Nadin on being asked by the plaintiff to assist him in the matter went and saw Mr. Snook, and as the outcome of that Mr. Nadin took the plaintiff to meet Mr. Snook. There was a meeting on April 12, 1935. At that meeting there were present the plaintiff, Mr. Nadin, Mr. Snook and Miss Snook, his daughter. There was at that meeting some discussion about the possibility of the inn being sold by Mr. Snook, and ultimately, and there could be no doubt on the evidence as to the fact, Mr. Snook did agree to sell the inn together with the land appertaining thereto, some nine acres, to the plaintiff, for the sum of

2000*l*. It was agreed that the sale should not be completed until after the determination of the existing brewery lease, that lease coming to an end on December 31, 1936, some eighteen months ahead, and in the meanwhile the sitting tenant was not to be disturbed. The plaintiff was anxious on that occasion to pay a deposit. Apparently considerable importance was attached, by persons in that part of the country at any rate, to the payment of a deposit. It seemed to be treated as though it was some evidence of the existence of a contract, and undoubtedly the plaintiff was anxious to pay a deposit to Mr. Snook. Mr. Snook was not prepared to accept the deposit then, nor was he prepared to record anything in writing. There seemed to have been some talk about a memorandum or writing of some sort at the time, for Miss Snook was asked to go and find pen and ink, which she did; she left the room and came back with pen and ink, but nothing in fact was done with regard to any memorandum or writing. The result was that there was an oral agreement between Mr. Snook and the plaintiff under which the plaintiff agreed to buy and Mr. Snook agreed to sell for the sum of 2000*l*. the Bridge Inn and the land appertaining thereto, but that the sale was not to be completed until January 1, 1937: in the meanwhile the sitting tenant was to remain.

The plaintiff, not unnaturally, thought the position not a wholly satisfactory one. He had nothing to show for the contract. He had not been able to persuade Mr. Snook to accept the deposit and there was nothing in writing to evidence the contract. There was no doubt that he did try to get matters on a more businesslike basis. In May, 1935, he rang up Mr. Snook's solicitors and sought to arrange a meeting between himself, Mr. Snook, and the solicitors, and suggested that Mr. Snook's solicitors might act for him with a view to getting some formal contract or some written memorandum of the fact; but in fact Mr. Snook never did accept a deposit, nor was there at any time anything in writing as evidence of the contract. Mr. Snook and the plaintiff continued for some very considerable period after the date of the contract to see each other frequently and go on motor trips, but there was never anything definite done with regard to this contract.

The next event of importance was this: In September, 1936, Mr. Heathcote got into communication with the plaintiff and informed him that he had found another inn or hotel or public-house which he thought would be suitable for himself; it was in the neighbourhood and it belonged to the same brewery as his landlords at the Bridge Inn and he thought it would be convenient if he could transfer himself to that inn, and that it would be convenient for him to do so in October, 1936. He inquired of the plaintiff whether it would be possible for him to take over the Bridge Inn before the end of the year so as to enable him, Mr. Heathcote, to move from the Bridge Inn to the inn he thought he would like to take. The plaintiff's position was this: He was no doubt prepared to move at the beginning of the year 1937, but he was, in October, carrying on his successful business in Sheffield at the Museum Hotel and he was asked whether he would give that up at comparatively short notice and go into the Bridge Inn. Of course it was necessary that there should be somebody at the Bridge Inn to whom the licence could be transferred and who could carry on business. He apparently was willing to fall in with Mr. Heathcote's suggestion, but he communicated with Mr. Snook before he actually agreed, and he asked Mr. Snook whether he would consent to the change being made, not at the time as originally agreed, namely, January 1, 1937, but in October, 1936. Mr. Snook acquiesced in that. He was willing, he raised no objection, and in fact he consented to the plaintiff taking over the Bridge Inn in October, 1936. There was no doubt whatever on the evidence that Mr. Snook was consulted with reference to that and did consent to it. Accordingly, on October 19, 1936, the plaintiff gave up his hotel in Sheffield and moved into the Bridge Inn. He got the necessary transfer of the licences and he proceeded to carry on business in the Bridge Inn as from that date. He, moreover, having got into the inn, proceeded to make considerable alterations and improvements to the property. He put in a new grate in one of the rooms and shifted the old grate into another room. He altered a door and did various decorations of papering and painting and things of that sort, and altogether he expended just under 200*l.* in alterations and decorations to the premises. Between October 19, when the plaintiff took possession of the Bridge Inn, and the end of November Mr. Snook paid a certain number of visits to the Bridge Inn; there was some little doubt as to the exact number of visits he paid, but there is no doubt whatever that he paid at least two visits, because Miss Snook herself in giving evidence said she went on two occasions with her father to the inn, and again there was no possible doubt from Miss Snook's own evidence that her father saw some, at any rate, of the alterations and decorations that were being done in the inn and expressed his approval of what was being done. It was quite plain that Mr. Snook was perfectly well aware and consented not only to the taking possession by the plaintiff of the inn in October, 1936, but he was also well aware that the plaintiff was doing substantial alterations and decorations to the premises, and that he assented to that in the sense that he in no way objected; on the contrary, he expressed approval of what was being done. About December 16 Mr. Snook became very seriously unwell, and he was more or less bedridden from that time until his death. He died in March, 1937, and by his will he appointed his daughter, Miss Snook, and the other defendant, who was a solicitor and had acted as his solicitor for some forty years, to be his executors. The defendants did not interfere with the occupation of the plaintiff at the inn or demand rent from him or take any steps in the matter until May, 1937, when they advertised the inn for sale. It was advertised in one of the Sheffield papers and came to the notice of the plaintiff. The advertisement stated that the inn was in the occupation of a tenant on a short tenancy. What exactly was intended by that was not very clear. The plaintiff on seeing the advertisement for the sale of the inn was not unnaturally perturbed and his solicitor got into communication with the defendants' solicitor, and finally this action was commenced. A lis pendens was registered which rendered it impossible for the sale to proceed, and accordingly the sale was postponed and this action was commenced.

C. E. Harman K.C. and *F. C. Watmough* for plaintiff. There is no question about there being an oral contract. The real question is that of part performance. The law is well laid down in Fry on Specific Performance, 6th ed., p. 276 (1), where the four points required to take an oral contract out of s. 40 of the Law of Property Act are clearly stated. The plaintiff in this action can satisfy all four points.

R. F. Roxburgh K.C. and *J. H. Boraston* for defendants. Sect. 40 of the Law of Property Act, 1925, is a complete answer to this action. The plaintiff must prove all the four points laid down in Fry, p. 276. (1) *Rawlinson* v. *Ames* (2) shows that the party trying to take himself out of the statute must prove all the acts of part performance. *Dale* v. *Hamilton* (3) deals with acts of part performance being referable to a particular contract. If they could refer to something else, it is not open to the Court to find they are referable to the particular contract. Here they might refer to a tenancy.

Harman K.C. in reply. The acts of part performance are sufficient to take the case out of s. 40. In *Nunn* v. *Fabian* (4) Lord Cranworth L.C. said that no yearly tenant would spend the amount that the plaintiff had done on the premises.

FARWELL J. The evidence completely satisfies me that there was an oral contract and that Mr. Snook knew and consented to the removal of the plaintiff from his hotel at Sheffield into the Bridge Inn and that he was well aware of and consented to the plaintiff doing alterations and repairs in the Bridge Inn. On these facts I have to consider whether the position is one which entitles the plaintiff to specific performance of the contract. [His Lordship dealt with the evidence and continued:] In these circumstances, what is the legal position? The defendants plead s. 40 of the Law of Property Act, 1925, but certain other defences are also raised to which I must refer.

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(1) See post, p. 512.

(2) [1925] 1 Ch. 96.

(3) (1846) 5 Hare, 369.

(4) (1865) L. R. 1 Ch. 35, 40.

[His Lordship dealt with an amendment of the defence which is not material for the purposes of this report, and continued:] Before I come to deal with that it is desirable to consider what is necessary to enable an oral contract relating to land to be specifically performed. There is nothing innately objectionable in an oral contract relating to land, and, if one of the parties to such a contract seeks to have it specifically enforced, it is enforceable unless the other party pleads s. 40 of the Law of Property Act, 1925. In my own recollection there was a case in which the pleader by inadvertence forgot to insert the Statute of Frauds as a defence, and when at the trial he sought for leave to amend by pleading the Statute it was refused. The Court said that, having allowed the matter to go to trial, it was too late then to amend by setting up the Statute and accordingly specific performance was decreed. It is not necessary for a defendant, if he does not choose, to plead the Statute, nor is it a matter of which the Court is bound to take notice, and in the absence of such a plea an oral contract is enforceable. Here the defendants have relied upon the section, and prima facie that is a good answer to the plaintiff's claim, and it is for him to satisfy the Court that there are circumstances which entitle him to succeed in the action notwithstanding that plea. One method of escape from a defence of that kind is a plea of part performance, that is to say, that, if the plaintiff can show that the defendant has done, or permitted to be done, acts which can only have been done or permitted with reference to the oral contract, which would render it a fraud upon him to set up the statute as an answer to the claim for specific performance, then under those circumstances, if those facts are proved, they may enable the plaintiff to escape from the difficulty in which the plaintiff in such a case is put by the plea of the statute. What is necessary in order to set up successfully the plea of part performance is stated in Fry on Specific Performance, 6th ed., p. 276: "In order thus to "withdraw a contract from the operation of the statute, "several circumstances must concur: 1st, the acts of part "performance must be such as not only to be referable to a "contract such as that alleged, but to be referable to no other "title; 2ndly, they must be such as to render it a fraud in "the defendant to take advantage of the contract not being "in writing; 3rdly, the contract to which they refer must be "such as in its own nature is enforcible by the Court; and "4thly, there must be proper parol evidence of the contract "which is let in by the acts of part performance." That statement not only is a statement by a very learned author but has received judicial approval, and undoubtedly it is the law which I have to apply.

No doubt for the plaintiff to succeed on the plea of part performance the contract must be one which, had it been in writing, would have entitled the plaintiff to specific performance, but the defendants seek to extend this beyond all reasonable limits. They seek to obtain assistance from the words used by Fry L.J., "they must be such as to render it a "fraud in the defendant to take advantage of the contract "not being in writing" by arguing that the onus is on the plaintiff not only of showing that there were acts which were referable and referable only to the contract which in themselves might be sufficient to constitute part performance, but that the plaintiff must prove affirmatively that there is nothing to prevent the contract being enforceable. It is said that it is for the plaintiff to show affirmatively that the part performance relied on is such as to render it a fraud in the defendant to take advantage of the contract not being in writing and that he must therefore prove, e.g., that the contract was not at such an undervalue as would amount to fraud or that the contracting party was not under such physical or mental disability as would render it improper or impossible for the contract to be enforced. That is a contention which I am wholly unable to accept. In my judgment, the position is reasonably plain. The plaintiff has to prove as a first step in the whole of the proceedings the existence of an oral contract. There must be clear evidence that there was such a contract. If there be evidence of such a contract, then he can enforce that contract unless the defendant sets up the Statute of Frauds. If the defendant sets up the Statute of Frauds, then it may be open to the plaintiff to avoid that difficulty by showing that there were acts which were referable only to the contract, which would render it a fraud in the defendant to take advantage of the contract not being in writing, and, if he can show that the defendant has done or stood by and permitted the plaintiff to do acts by which the plaintiff has altered his position, and such standing by and consent can only have been with reference to the oral contract, then the plaintiff has done all that he is bound to do to get himself out of his difficulty. If the defendant seeks to rely upon such a plea as fraud, evidenced by undervalue, or the mental or physical incapacity of the vendor or the purchaser, as the case may be, those are matters which the defendant must plead specifically and must prove, and it is not for the plaintiff to prove a negative. In the ordinary course, if the plaintiff pleads in his statement of claim an oral contract and the defendant sets up the Statute as an answer, the plaintiff then replies by pleading acts upon which he relies as part performance, and if the defendant desires to set up such a defence as I have suggested, then it is for him to seek to amend his defence by setting up those matters on which he relies in addition to the defence of the Statute. In my judgment, it is absurd to suggest that the plaintiff in a case such as this has to come to the Court armed with evidence that the defendant was a person of sound mind or that the price was not an undervalue, in the absence of any such allegations by the defendant, and I cannot doubt that any matters of that sort upon which the defendant desires to rely must be set up and proved by him. In the present case no question of undervalue arises, because that is not pleaded in the defence.

[His Lordship dealt with evidence relating to the mental condition of Mr. Snook, which is not material for the purposes of this report, and continued]: That being the position, the

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plaintiff has got so far on his road, he has proved an oral contract, he has proved Mr. Snook knew and consented to his leaving the inn at Sheffield and moving into the Bridge Inn, he has proved that Mr. Snook knew that he was expending money on making alterations and doing repairs to the inn, and he says that he is entitled to succeed in this action.

That brings me to what seems to me the only real difficulty, if there be a difficulty in this case. Are the acts upon which the plaintiff relies sufficient to make them such part performance as entitles the plaintiff to succeed? Undoubtedly, in my view, any acts relied upon must be acts which are necessarily referable to the oral contract. Thus it has been held that a mere payment of money is insufficient although the money paid may be the exact price which was agreed as the consideration for the contract. That is because there is nothing in the payment of money alone to connect it in any way with the subject-matter of the oral contract, and in order to establish the plea of part performance the acts relied upon must be such as, apart altogether from any evidence of intention or the like, appear to the Court to be necessarily referable to the contract alone. Thus, if the defendant being himself in possession permits the plaintiff to enter into the property and to spend money on it, that is prima facie sufficient, because the entry into the property and the expenditure of money on the property are directly connected with the subject-matter of the contract, and prima facie there can be no reasonable explanation of the defendant permitting the plaintiff to do such acts, except in reference to the contract itself.

The Court will not presume an illegality, and will not presume that the plaintiff is a mere trespasser; and under those circumstances it has been held that such acts, unless satisfactorily explained by the defendant, are necessarily referable to the contract and are therefore sufficient to constitute part performance, because it would be wrong to permit the defendant, having allowed the plaintiff to alter his position by going into possession and spending money, subsequently to turn round and say that there was not a written contract and therefore he was not bound.

Those considerations bring me to this: Can I say here that the acts relied upon are necessarily referable to the contract? I know of no case in which the circumstances are exactly similar to the present, because in this case at the time when the plaintiff went into occupation of the inn it was not in the occupation of Mr. Snook, the other contracting party, but was still subject to the lease to the brewery, and Mr. Heathcote was the tenant, and therefore entry by the plaintiff is not necessarily referable to the contract. Further, it has been said that the expenditure by the plaintiff of money on the premises is explicable because he may have been so foolish a person as to be prepared to spend money on the property notwithstanding that at the end of some two months or less he could be evicted from the premises, and therefore having regard to those circumstances this is not a case in which it can be said the acts are necessarily referable to the contract. In my judgment, "necessarily referable to the contract," which is the phrase which I think is appropriate, does not mean that the acts cannot be necessarily referable to the contract because there may be some other explanation of them, however fantastic that explanation may be. The Court, in my judgment, has to look at all the circumstances and has to determine whether in the circumstances of the particular case the acts can be said to be necessarily referable to the contract. The fact that an ingenious mind might suggest some other and improbable explanation of the facts is not necessarily fatal to the plaintiff. It is impossible to lay down any general principle, but the Court must be satisfied that the acts relied upon are necessarily referable to the contract having regard to all the circumstances. In the present case it is almost fantastic to suppose that a business man, as undoubtedly the plaintiff is, with a large experience in the licensing trade, would have abandoned his flourishing business in Sheffield, would have left his hotel there and moved into this small inn, with a comparatively small barrelage and a comparatively small business and expended money on the premises, money of quite a

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considerable amount having regard to the premises, if he contemplated the possibility of being evicted at the end of that year. It is equally impossible, in my view, to imagine that Mr. Snook himself consented to the plaintiff taking over the premises and acquiesced in the expenditure of money on the footing that at the end of the year he would be able to evict the plaintiff and take advantage of the expenditure which he, the plaintiff, had made on the premises. Assuming, as I am bound to do, and as the evidence has established, that Mr. Snook was a man who acted and intended to act rightly and fairly, it is impossible to suppose that he permitted those things to be done, unless he was giving his permission, and acquiescing in the expenditure, because he knew there was in existence the oral contract under which Mr. Broughton would become the purchaser of the property both in law and in equity after the end of that current year.

In my judgment, under all those circumstances, there is sufficient here to establish the plea of part performance, and consequently the plea of part performance is enough to defeat the plea of the statute. The oral contract being proved the plaintiff is entitled to the relief which he seeks.

There is no evidence of, and no claim has been made at the Bar, to damages. The order therefore will be the usual order for specific performance in a case where the title has not been accepted. The plaintiff must pay the purchase price of 2000*l.* and he must pay interest at 4 per cent. from January 1, 1937. The defendants must pay the costs of the action.

Solicitors for plaintiff: *Gibson & Weldon, for Smith, Menneer & Co., Sheffield.*

Solicitors for defendants: *Vizard, Oldham, Crowder & Cash, for Edward W. Pye-Smith & Son, Sheffield.*

P. J. B.

In re FIRTH.

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Apportionment—Death of tenant for life—Sale by trustees of stocks and shares cum dividend, part of which accrued due during life of tenant for life—Estate of tenant for life not entitled to any share in purchase price, unless in very special circumstances—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35).

Where the trustees of a settlement, on the death of a tenant for life, sell investments cum dividend, part of which accrued during the life of the tenant for life, the Apportionment Act, 1870, does not apply, and the estate of the tenant for life is not entitled to share in the proceeds of sale, except in very exceptional circumstances.

Bulkeley v. *Stephens* [1896] 2 Ch. 241 and *In re Winterstoke's Will Trusts*, ante, p. 158, considered.

ADJOURNED SUMMONS.

The testator by his will, dated December 23, 1920, appointed his wife and the plaintiffs to be his executors and trustees and, after making various gifts and bequests, he made a general residuary devise and bequest to his trustees of his real and personal estate upon trust either to retain the same as invested or to sell and convert the same into money, with several ancillary provisions, and to stand possessed of his trust estate upon trust out of the income thereof to pay an annuity of 1500*l.* a year to his son Geoffrey Firth upon protective trusts, with a gift to his issue (if any) after his death and subject thereto to pay the whole income of the trust estate to his wife during her widowhood and after her death, in case Geoffrey Firth should die without issue, the testator directed his trustees to hold the trust estate upon trust to divide the same into 242 equal shares and to hold such shares upon trust for thirteen named persons in various proportions, of which 36 shares were to be held in trust for the defendant Iris Daphne Collier.

The testator died on December 29, 1922, and Geoffrey

Firth died without issue on April 25, 1921. The testator's widow, the tenant for life, died on July 10, 1937, having by her will appointed the plaintiffs and the defendants, Gladys Hall and Jeannette Annie Proctor, to be her executors.

At the time of the death of the tenant for life the trust estate consisted mostly of a large number of investments quoted and dealt with on the London Stock Exchange. After the death of the tenant for life the plaintiffs sold a number of these investments in order to pay estate duty and others in order to pay out the shares of the beneficiaries who wished to receive their shares in cash. Other investments were transferred by way of appropriation in specie to beneficiaries at the middle market price ruling at the day of appropriation. In cases where interest or dividend on investments sold had been received by the plaintiffs after the death of the tenant for life and before sale or appropriation and in cases of investments sold or appropriated ex dividend the interest or dividend thus received by the plaintiffs was apportioned down to the day of the death of the tenant for life and the relative proportion thereof accrued down to her death was paid or credited to her estate. Many other investments were sold or appropriated cum dividend and the plaintiffs were advised that in such cases apportionment was unnecessary, the estate of the tenant for life not being entitled to any share or part of any accruing dividend. Later their attention was called to *In re Winterstoke's Will Trusts* (1), and in consequence they issued this summons, which asked whether in the case of the stocks, funds and securities falling within one or other of the several classes specified in the schedule thereto or any and which of the same (being stocks, funds and securities sold or appropriated to beneficiaries by the plaintiffs cum dividend or cum interest and in respect of which interest or dividends became or might become payable after such sale or appropriation, but in respect of a period either wholly or partly prior to the death of the tenant for life), any and what apportionment or adjustment in respect of income in favour of the estate of the tenant for life should be or ought to have been made out of the purchase price or notional purchase price received by the plaintiffs upon such sales or appropriations. I. D. Collier was appointed to represent the residuary legatees in remainder under the testator's will.

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(1) [1937] W. N. 348 ; since reported ante, p. 158.

The schedule above referred to contained the following: Class I. Government or Municipal loans, British or foreign, carrying a fixed rate of interest—examples: 3½ per cent. War Loan; 5 per cent. Union of South African Loan, 1940–60; Bradford Corporation 4¾ per cent. Loan.

Class II. Debenture stocks or fixed interest preference stocks, the interest or dividends on which were not in arrear—examples: Vancouver Power Co. 4¼ per cent. perpetual debenture; Lever Bros., Ld., 7 per cent. preference shares.

Class III. Ordinary or deferred stocks or shares upon which the rate of dividend (if any) was unascertainable until declaration—examples: Johannesburg Consolidated Investment Co., Ld., ordinary shares; Anglo-French Exploration Co., Ld., ordinary shares; New Crocodile River 2*s.* ordinary shares.

Class IV. Debenture stocks or fixed interest preference stocks, the interest or dividends upon which were in arrear—examples: Elder Dempster & Co., Ld., 6 per cent. cumulative preference stock; Central Argentine Railway 4½ per cent. non-cumulative preference stock; Leopoldina Railway 4 per cent. debenture stock.

Special case. Imperial Tobacco Co. 6 per cent. "B" preference stock; dividend received August 3, 1937, in respect of half-year to April 30, 1937. A further half-year's dividend payable in February, 1938, in respect of half-year to October 31, 1937. Sold September 28, 1937. The plaintiffs were advised by a firm of London stockbrokers that, having regard to the day to day fluctuations in market sentiment and outside influences, no fixed rule could be formulated as to the degree to which the imminence of the payment of a dividend or interest upon any given investment was reflected in the price paid by a purchaser, but that (*a*) in cases where a dividend was fixed or had been declared the price of the investment affected immediately after the same had gone ex dividend would (generally, but not uniformly speaking) be

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lower by a sum roughly equivalent to the amount of the dividend so deducted (less income tax), and (*b*) in cases where a dividend was not fixed and (although imminent) had not been declared no calculation could reasonably be made of the increase of price (if any) paid by a purchaser by reason of the imminence of a dividend, and (*c*) that even in the former class of cases the influence of dividend on price would be incapable of measurement, except for a very short period of time immediately before and immediately after the declaration or deduction of the dividend.

A. C. Nesbitt for the plaintiffs.

L. B. Tillard for the legal personal representatives of the tenant for life. Where it is possible in a case like this, an apportionment should be made, giving the estate of the tenant for life some share in the proceeds of sale of investments sold cum dividend. This duty falls on the trustees whatever difficulties arise with regard to some of investments sold. It is a case where the Court has to consider whether it should apply some sort of equitable bookkeeping. The principle was admitted in *Bulkeley* v. *Stephens.* (1) In *In re Winterstoke's Will Trusts* (2), a very similar case to the present, Clauson J. held that there should be an apportionment. It is true that in *In re Walker*; *Walker* v. *Patterson* (3) he held that the estate of the tenant for life was not entitled to an apportionment, but *In re Winterstoke's Will Trusts* (2) must prevail and should be followed.

Wilfrid M. Hunt for the persons entitled to the residuary estate. The Apportionment Act, 1870, has nothing whatever to do with this case. It has been suggested that the legal personal representatives have some equity, but the burden of proof is on them to prove such an equity and they have failed to discharge the burden. *Bulkeley* v. *Stephens* (1) does not apply to the case of an ordinary trust, such as this. In *In re Winterstoke's Will Trusts* (2) Clauson J. only held that where it is very easy to apportion, the legal personal representatives of the tenant for life can come to the Court and ask for an apportionment. That case does not apply here and does not govern this case.

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(1) [1896] 2 Ch. 241.

(2) Ante, p. 158.

(3) [1934] W. N. 104.

FARWELL J. The plaintiffs took the view, acting on advice, that in the case of all such investments as were sold or appropriated cum dividend, no allowance or adjustment ought to be made out of the purchase price received, or notionally received, by them in respect of any increase of price caused by the fact that the ensuing interest or dividends upon such investment had commenced to accrue prior to the death of the tenant for life; but, since they have received that advice and acted upon it, their advisers have called their attention to a decision, to which I shall refer, of Clauson J. in *In re Winterstoke's Will Trusts* (1), which caused them to doubt whether the course which they had adopted was right, and very properly they have come to the Court to know what their position is in the matter and what steps to take.

There is evidence before me from stockbrokers as to the difficulty in this case of assessing the amount of the purchase price of the investments properly attributable to the respective dividends.

[His Lordship read the advice given to the plaintiffs, as set out above, and continued:] Prior to the decision of Clauson J. (1) it was a clearly recognized rule that in cases of this sort the Apportionment Act, 1870, did not apply, and that any equity which the tenant for life might have had to any portion of the purchase price of the stock sold or otherwise realized was not an equity which this Court was prepared to enforce. The case of *Bulkeley* v. *Stephens* (2), which was decided by Stirling J. in 1896 seems to me to make that quite plain. The head-note is this: " Stock in a "public company forming part of a testator's residuary estate "was settled upon trust for A. for life, and after her death "' to pay transfer and assign my residuary estate and the "' stocks funds and securities upon which the same shall be "' invested unto and amongst ' certain beneficiaries. After "the death of the tenant for life the stock was sold ' cum

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(1) Ante, p. 158.

(2) [1896] 2 Ch. 241.

"'dividend' under an order of the Court for the purposes "of distribution. This order was made in the absence of the "legal personal representatives of the tenant for life. After "the sale a dividend was declared and received by the "purchaser in respect of profits, a portion of which had been "earned prior to the death of the tenant for life:—*Held,* that "the estate of the tenant for life was not entitled under the "Apportionment Act, 1870, to be paid out of the purchase-"money of the stock anything in respect of the dividend; "but, inasmuch as if the trust had been strictly carried out "in accordance with the terms of the will, by transferring "the investments to the beneficiaries, the representatives of "the tenant for life would have been in a position, either "directly, or through the trustees, to obtain payment of an "apportioned part of the dividend, their claim ought under "the special circumstances of the case to be acceded to." In the special circumstances of that case Stirling J. came to the conclusion that the tenant for life was entitled to some portion of the purchase price as representing dividend; but it is clear from what he said that he was in that case applying not the general rule at all, but was, owing to the special circumstances, departing from what was the general rule as well settled and ordinarily followed. He cites two earlier decisions, both of them of Kindersley V.-C., in which no right of the legal personal representative of the tenant for life to any apportionment was recognized, and says (1): "The reasons given by the Vice-Chancellor are two—first, the "absence of any practice giving effect to the equity alleged; "secondly, the great burden which the introduction of the "practice would cast on trust properties. The first of these "reasons seems to be applicable to the present case. No case "has been cited in which effect has been given to such a right "as is here claimed. I have inquired as to the practice in "the Registrar's Office, and have been informed that no such "practice is recognised in the ordinary course of dealing with "funds directed to be sold on the death of a tenant for life, "and, further, that there is no case in which an order has

(1) [1896] 2 Ch. 248.

"been made giving effect to the right claimed. As to the "second of the Vice-Chancellor's reasons, the burden certainly "does not appear so great as on a change of investments— "first, because in the latter case the alleged right would arise "both on the sale of the original investment sold and on the "reinvestment, whereas here it affects the sale only; and, "secondly, because changes of investment may take place "often, whereas a sale for the purpose of distribution must "take place only once for all. Still the burden is considerable. "What the legal personal representatives of the tenant for "life ought to receive is so much of the purchase money as "represents—in the language of the Vice-Chancellor (1)—the "value of the proportionate part of the dividend. How is "that value to be ascertained? It was suggested that it is "to be ascertained simply by finding the dividend actually "paid and treating it as subject to a discount of, say, 4 per "cent. during the period between the sale and the payment "of the dividend. In many cases that might work very "considerable injustice. I do not see how it can be determined "except by means of the evidence of stockbrokers as to the "price at which the stock could have been sold at the actual "time of sale ex dividend, the difference between this and "the actual price being treated as the value of the dividend. "That would, in many cases, result in a conflict of evidence, "and the trustees would have to come to the Court for pro-"tection. Again, in the cases of companies, the distribution "would almost always be delayed, and possibly for a long "time. Looking at all these circumstances, I am not prepared "to introduce any novel practice applicable to the sale of shares "in the ordinary course of the execution of a trust consequent "on the death of a tenant for life."

As I read that judgment, what the learned judge is saying is this, that down to that date in 1896 there had been a general and well recognized practice, under which the legal personal representatives of the tenant for life received no part of the purchase price of investments sold or assigned on distribution, and that he is not prepared to introduce any novel practice which would inevitably in many cases throw a heavy burden on the trustees and might result in serious questions of fact between the legal personal representative of the tenant for life, the trustees, and the ultimate remaindermen, and necessitate applications to the Court and expenditure of money which, under the practice then existing, was rendered wholly unnecessary. Both before and since that decision that has been generally accepted. It is stated as the rule in various text-books on the subject, and until the decision of Clauson J. it has never been doubted that that was the way in which trustees could properly deal with matters of this kind. As Stirling J. pointed out, and as he decided in the case before him, there may be special circumstances under which the legal personal representative of the tenant for life may be able to show some special reason why the equity should be asserted in his favour; but in the absence of special circumstances I think that I am right in saying the practice always has been in cases of this kind that the tenant for life and his personal representatives do not get any part of the purchase price on such sales as this. But the matter has now to be considered in the light of the decision of Clauson J. (1) In that case the head-note is: "Where, on "the death of a tenant for life, the trustees of the settlement "sell securities 'cum dividend,' and part of the dividend "accrued while the tenant for life was alive, the trustees "should, if requested so to do, account to the executors of "the tenant for life for the proportion of the dividend which "has so accrued, so as to preserve the rights which the "deceased tenant for life would have had if the securities "had been sold 'ex dividend.'" The learned judge considered the case to which I have just referred before Stirling J. In the case before Clauson J. the sum involved was a very large one. The first Baron Winterstoke died on January 29, 1911, "having by his will, dated July 15, 1907, "created certain trusts for two ladies in equal moieties as "tenants for life and, subject to those life interests, for "various remaindermen. One of the tenants for life died

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(1) *Scholefield* v. *Redfern* (1863) 2 Dr. & Sm. 173, 182.

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(1) Ante, p. 158.

"on August 22, 1932, and one moiety of the trust funds was "distributed. The other died on September 22, 1936. The "moiety of the estate whence her income was derived was "about 1,300,000*l.*, the estate duty amounting to about "500,000*l.* The estate included ordinary stocks on which the "final dividend for the financial year ending on October 31, "1936, was to be declared and payable in March, 1937; an "interim dividend had been paid to the tenant for life shortly "before her death. The trustees sold certain of the stocks "to pay death duties, selling in every case 'cum dividend' "so that no current dividend was received by them. An "apportionment of the dividend accruing from the date of "the last payment of dividend until the date of the death "of the tenant for life showed that the amount was "2160*l.* 13*s.* 1*d.*" Exactly what the investments were in that case is not stated, but I think that I am entitled to assume that the investments were of such a nature that it was easy to ascertain what was the proper proportion, because the trustees had found it possible to work out down to a penny what was the proper sum. The executors of the tenant for life claimed that they were entitled to that sum, and that was the question which came before Clauson J. and which he decided. In the course of his judgment, he said this (1): "In order to deal with the question of principle in simple "language, I will take the case of a fund consisting of 10,000*l.* "Government securities carrying a half-yearly dividend. "I will first assume that the trusts are to pay the income "to A.B. during his life, after his death to pay the income to "C.D. for his life, and, subject to those two life interests, to "hold the fund in trust for E.F. A.B. dies at a date at which "two months of the current half-year have elapsed. C.D. is "surviving, and continues to live until after the end of that "half-year. No change is made in the investments. Nobody "doubts that it would be the duty of the trustees, on receiving "the dividend four months after A.B.'s death, to pay one-"third of it to the executors of A.B. and pay the other two-"thirds to C.D. Suppose, however, that the trusts are not

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(1) Ante, pp. 158, 160.

"for A.B. for life and then to C.D. for life and, subject to "their life interests, for E.F., but are for A.B. for life and, "subject to his life interest, for E.F. Under those circumstances it would be astonishing that A.B., by himself or his "executors, should receive less income in respect of his life "interest than he would have received if, after his life interest, "another life interest had been interposed. It is suggested "that if, in the simple case that I have put of A.B. being the "tenant for life and, on his death, the fund being held in "trust for E.F., the trustees sell the securities in the ordinary "way on the Stock Exchange—a sale which would carry to the "purchaser the right to receive the whole of the half-yearly "dividend—A.B.'s rights are thereby altered and his executors "are deprived of the two months' income from the last "dividend date to the date of A.B.'s death, which, it is "obvious, in view of the trusts which I have stated, the "settlor or the testator intended A.B. to have.

" In my judgment, the solution of the difficulty is this. "The trustees, when they sell the securities, ought so to "arrange matters as to preserve, if they reasonably can be "preserved, the rights of A.B. One way of preserving the "rights of A.B. would be to defer the sale until after the half-"year has expired. If they do that, no difficulty arises, because "the trustees will themselves have received the whole of the "half-year's dividend, and they will apportion it, and give "the executors of A.B. the third to which they are entitled. "I have some reason to believe that in practice this is very "often done. It may be, however, that there are inconveniences in deferring the sale until after the end of the "half-year, and that the trustees feel that they ought to sell "the securities at once, as they did in this case. It would, "theoretically, be possible for them to sell to a purchaser on "a special bargain that the purchaser, in due course, when "the dividend is paid, should account to the trustees, the "vendors, for an apportioned part of the dividend, for which "they would thereupon account to the executors of A.B. "No practical stockbroker would ever advise an attempt to "deal with securities on sale by such an artificial method "as that. Another way would be simply to sell so that the "purchaser receives the dividend and, on the receipt of the "purchase price, to set aside out of the purchase price a sum "equivalent to the dividend, apportioned as from the last "dividend due before the death until the death of the tenant "for life, and account for that sum to the executors of the "tenant for life. That process will carry out precisely what "the testator intended, and will give the tenant for life the "income which the testator intended he should have. In the "present case the trustees, before the end of the dividend "period, sold, and there is no difficulty in ascertaining that "figure which would represent the apportioned dividend from "the dividend date last preceding the death of the tenant for "life to the date of the tenant for life's death. The figure "has been ascertained and appears in the summons as "2160*l.* 13*s.* 1*d.* I do not propose to say that trustees, who "in fact sold under those circumstances and, without the "question being raised by anybody, in fact failed to account "to the executors of the tenant for life for the apportioned "dividend and allowed the whole purchase money to be "taken by the remaindermen, would necessarily be liable for "breach of trust. In small cases, I dare say even in large "cases, it has no doubt been the practice, a practice possibly "justified by certain dicta of Stirling J. in *Bulkeley* v. "*Stephens* (1), not to make this special reservation for the "tenant for life or to account to his executors for the apportioned dividend; but it appears to me that when the "question has been raised and there is no difficulty in ascertaining the figure which would be payable to the executors "of the tenant for life, the trustees may properly deal and "ought to deal with the matter in the way I have indicated, "that is to say, by accounting to the executors of the tenant "for life for the apportioned dividend.

" In the present case the executors of the tenant for life "claim that that should be done. The trustees ask for the "direction of the Court whether they should accede to that "request and do it. As, in acceding to that request, they

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(1) [1896] 2 Ch. 241.

"seem to me to be carrying out the intention of the testator, "and not to be doing any act which is detrimental to, or "interferes with, any right of the remaindermen, I propose "to declare that the trustees ought, in the present case, not "to treat the whole of the purchase price as capital, but "ought to apportion it as between, on the one hand, the "remaindermen, and, on the other, the executors of the "tenant for life, by paying over to the executors of the "tenant for life, out of the purchase price, the sum of "2160*l.* 13*s.* 1*d.*"

I think that judgment must be considered with some little care. In the first place, with the greatest possible respect to the learned judge, I think it is an under-statement to say that " in small cases, I dare say even in large cases, it has no "doubt been the practice " not to make a special reservation. I think the truth is that in every case, except possibly under very special circumstances, that has been the general practice, certainly ever since the decision of Stirling J. in 1896, and for very many years before that, and it has never been suggested that in so acting, trustees have done anything in breach of trust or inequitable between the persons beneficially entitled to the estate. Further, in my judgment that is still the practice which, apart from some very special circumstances, trustees are entitled to follow, and I do not think that Clauson J. was intending to do what Stirling J. refused to do in the case before him, and introduce some novel practice which had not hitherto been the practice. I do not think that he meant to do more than say that there may be cases in which the Court will depart from general practice and give to the legal personal representative of the tenant for life some share of the purchase price. Except in such cases, in my judgment, trustees are under no obligation to come to the Court for directions, and, if they follow what has been the universal practice for many years, they will not be committing a breach of trust. If a claim by the legal personal representative of the tenant for life to some proportion of the purchase price is put forward, it may be necessary to apply to the Court for directions, but I certainly do not take the view that, apart

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from some special circumstances, the trustees ought to come to the Court and incur the cost of a summons, in order to ascertain whether they ought or ought not to make such apportionment as is suggested in this case. In my judgment they may safely act on the well recognized practice, in the absence of some special circumstances or some claim by the legal personal representative of the tenant for life.

I would point out that there is to my mind a serious difficulty in appreciating exactly what the learned judge meant in the case before him, because he says this (1): "but it appears "to me that when the question has been raised and there is "no difficulty in ascertaining the figure which would be "payable to the executors of the tenant for life, the trustees "may properly deal and ought to deal with the matter" in a particular way. For myself, I am unable to see what difference it can make, whether the calculation is an easy one or a difficult one. If the tenant for life has an equity which he has a right to assert in this Court, his right cannot depend on whether the sum which has to be done is one which can be done easily, or which requires care and consideration. But however that may be, in my judgment nothing has altered the practice which has obtained for many years.

In the present case it is obvious that any calculation which would have to be made would be far from easy. It could be done in the cases of some of the investments, no doubt, but it would be obviously wrong to make a distinction; it must be a case of all or none, and this is not a case where there is no difficulty in ascertaining the figure which would be payable, and in the absence of some special circumstances I have come to the conclusion that the executors of the tenant for life are not entitled to an apportionment, and I will make a declaration accordingly.

Solicitors: *Robins, Hay & Waters, for Lacey & Son, Bournemouth; Pennington & Son.*

P. J. B.

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(1) Ante pp. 158, 162.

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Jan. 14, 17, 18; *Feb.* 18.

In re WARWICK'S SETTLEMENT TRUSTS.

GREVILLE TRUST COMPANY *v.* GREY.

[1936. W. 1647.]

Settled land—Tenant for life—Assignment of equitable life interest—Deficiency of income to meet jointure and interest on portions—Payment in full by assignee—Whether assignee entitled to recoupment out of corpus.

Where a jointure and interest on portions are charged on capital as well as income and a tenant for life pays out of his own pocket the amount by which the income of the estate in any year is insufficient to meet the jointure and the interest on the portions, and upon the facts there is no indication of an intention to keep the charges alive for his own benefit, he is not entitled to a charge on the estate for the amount so paid.

Per Sir Wilfrid Greene M.R. (Clauson L.J. dubitante).

Where, however, a sufficient indication of intention is given to entitle the tenant to such a charge, he will be entitled to an immediate right to enforce it against capital.

Kensington v. *Bouverie* (1859) 7 H. L. C. 557 considered.

Decision of Farwell J. [1937] Ch. 561 affirmed.

APPEAL from a decision of Farwell J. (1)

By an indenture of settlement dated April 28, 1909, and made upon the marriage of the sixth Earl of Warwick (then Lord Brooke) the Warwick Estates to which Lord Brooke was then absolutely entitled in reversion expectant upon the death of the fifth Earl were charged with a jointure rentcharge in favour of his wife and with portions in favour of the younger children of the marriage. In the events which happened the amount of the jointure rentcharge created by the settlement was 3000*l.* It was charged on the whole of the Warwick Estates and was payable quarterly, interest being payable on any instalment remaining unpaid for more than one quarter. By way of additional security the estates were demised to trustees for a term of 500 years under which they were entitled on the estates falling into possession to raise the amount of the jointure rentcharge with interest and any arrears either out of the rents and profits or by sale of timber or minerals or by mortgage for the whole or part of the term.

(1) [1937] Ch. 561.

In the events which happened the sum charged for portions under this settlement amounted to 15,000*l.* The settlement charged the estates with interest on the portions at 4 per cent. per annum, and the portions and the interest thereon were further secured by a term of 2000 years granted to the trustees. Under this term the trustees had, for the purpose of raising the portions and interest, powers similar to those conferred upon them in relation to the jointure rentcharge.

The fifth Earl of Warwick died on January 15, 1924. By his will dated February 11, 1924, the sixth Earl devised the Warwick Estates to trustees upon trusts under which for an extended period so defined as not to infringe the rule against perpetuities the Earl of Warwick for the time being was to have a life estate with remainder at the expiration of the period to the then Earl of Warwick in tail male. By a second codicil dated December 16, 1925, the sixth Earl bequeathed to his wife during her life an annuity of such an amount as would make up the 3000*l.* to that amount free from income tax and super-tax (clause 3). By clause 4 he bequeathed to his trustees the sum of 10,000*l.* for each younger son who should survive him with interest at 5 per cent. per annum from his death. By clause 6 he charged the Warwick Estates settled by his will with the payment (in aid of his residuary estate) of the annuity and the sums bequeathed by clause 4 and he declared that those sums should be in addition to the portions sum provided by his marriage settlement. By clause 11 of his will his residuary estate was to be invested in freehold hereditaments for an estate in fee simple which were to be held upon the same trusts as the estates thereby settled.

The sixth Earl died on January 31, 1928, and thereupon his eldest son succeeded to the title as seventh Earl and became entitled to an estate for his life in the Warwick Estates and the residuary estate settled by his father's will. There were two other children—namely, the respondents Richard Francis Maynard Greville and John Ambrose Henry Greville. The dowager Countess, widow of the sixth Earl, who is entitled to the jointure rentcharge under the settlement and the annuity under the will, survived him.

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By an agreement dated April 1, 1932, the seventh Earl agreed to sell to the appellants his equitable life estate under the will of the sixth Earl. The sale became effective at the date of the agreement but no assignment was executed. The appellants own other property as well as the life interest.

In each of the three years ending March 31, 1933, 1934 and 1935, the income of the settled property was insufficient to meet the jointure rentcharge under the marriage settlement, the annuity given to the Dowager Countess by the will of the sixth Earl, and the interest on the portions, and the deficiency was made up by the appellants out of the income of the other property belonging to them.

The appellant company took out this summons to obtain a declaration that they were entitled to be recouped out of the capital or corpus of the property charged by the settlement to the extent to which the jointure and interest on portions, through insufficiency of income, were paid by them out of their own moneys, and a declaration that they would be entitled to a like recoupment for the year ending March 31, 1936, and future years.

FARWELL J. held (1.) that the jointure and interest on portions were a continuing charge on the settled estates; (2.) that during the lifetime of the tenant for life, or so long as the settled estates remained unsold, it could not be shown that when the final account of the life tenancy was taken there would be a deficiency in the total rents and profits; (3.) that accordingly during that period no claim for recoupment of a deficiency in one or more years could be sustained.

The company appealed. The appeal was heard on January 14, 17, 18, 1938.

Cyril Radcliffe K.C. and *A. Guest Mathews* for the appellants. Under the charge imposed in respect of the jointure rentcharge and the interest on portions the income of settled estate is primarily liable, but in so far as it is insufficient the charge on capital becomes effective as the only source from which payment can be made. That is a charge the jointress and portioners could have enforced if the appellants, who stand in

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the position of the tenant for life, had not discharged the deficit out of other money, and the appellants are entitled to the benefit of that charge.

[SIR WILFRID GREENE M.R. If the deficit had been raised out of capital, would there be a right to have it recouped out of the surplus income of subsequent years ?]

So long as the arrears have not been raised out of capital the tenant for life must apply subsequent surplus income to pay them ; but when once the arrears have been raised there is a difference of judicial opinion as to whether the capital must be recouped out of surplus income. The appellants claim that as they have made good the deficiency in the income they must, seeing that they stand in the position of a tenant for life, be presumed to have intended to keep alive the charge for their own benefit : see Gover on Capital and Income, pp. 148, 149, and *Burrell* v. *Egremont* (*Earl*). (1) That is so where there is a charge on income, and there is no need of any express notice to keep the charge alive: *Kensington* v. *Bouverie*. (2) Authorities bearing on the question whether after the charge has been enforced capital is entitled to be recouped out of future surplus are *Honywood* v. *Honywood* (3), *In re Coxon. Ferrers* v. *Croxton* (4), where reference was made to *In re Grant, Walker* v. *Martineau*. (5) See also *In re Manchester's* (*Duke*) *Settlement*. (6)

We submit that the conclusion of Farwell J. that the appellants must wait to see the result of the accounts for the whole tenancy for life before they can enforce their charge is wrong.

On the evidence no substantial case of mismanagement of the estate has been made out.

Roxburgh K.C. and *L. W. Byrne* for persons interested under the settlement. The question whether these charges are to be considered as extinguished or as kept alive for the benefit of the appellants is one of intention.

It is submitted that where a tenant for life pays the interest, although the rents and profits are insufficient for the purpose he cannot make himself an incumbrancer on the estate for this excess of his payments, if he has not given to the remainderman any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance: *Kensington* v. *Bouverie.* (1)

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(1) (1844) 7 Beav. 205.
(2) (1859) 7 H. L. C. 557.
(3) [1902] 1 Ch. 347.
(4) [1915] 2 Ch. 290.
(5) (1883) 52 L. J. (Ch.) 552.
(6) [1910] 1 Ch. 106, 116.

In the present case the appellants were under no obligation to make the payments of the jointure and interest on portions beyond the amount of the income of the settled estates received by them. They should have left the chargees to take such remedies as were open to them against corpus.

The payment of the deficiency, as appears from the evidence, was made by appellants to prevent the enforcement of the deficiency of the annuity and interest against the estates to the income of which the appellants were entitled. That rebuts the presumption that they intended to keep their charge alive and shows that they did not intend to claim recoupment of the moneys so paid. If they had intended to make this claim they should have made some declaration or done some act demonstrating that intention: *Kensington* v. *Bouverie.* (1)

Danckwerts for the trustees of the will and *G. P. Slade* for the Earl of Warwick took no part in the argument.

Radcliffe K.C. replied.

Cur. adv. vult.

1938. Feb. 18. The following judgments were read:—

SIR WILFRID GREENE M.R. [after stating the facts as above set out, continued:] In these proceedings the appellants seek to establish a right to a charge upon the settled property in respect of the sums so paid to make up the deficiency.

The first question which arises for consideration may be thus stated. Where the rents of a settled estate are insufficient to keep down an incumbrance which, although charged both on income and on corpus, is primarily to be discharged out of income and the tenant for life makes up the deficiency out of his own pocket, is it competent for him to keep the charge alive for his own benefit in such a way as to give him an

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(1) 7 H. L. C. 557.

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immediate right of recourse against corpus ? Or is he bound to wait until the termination of his life estate in order to see whether or not, on a final account being taken between income and corpus, any balance is due to him ?

In considering this question there are two propositions which can be asserted at the outset without fear of contradiction. One is that where a limited owner discharges by payment an incumbrance upon the corpus of the settled property which he is under no personal obligation to discharge he is entitled to keep the incumbrance alive for his own benefit and enforce it according to its terms. The other is that in the absence of any indication to the contrary his intention to keep the incumbrance alive will be presumed. These principles are so familiar that authority is scarcely necessary. But as they are the starting-point of the argument I will give two quotations. "Now in a Court of equity," said Jessel M.R. in *Adams* v. *Angell* (1), "it has always been held that the mere fact of a "charge having been paid off does not decide the question "whether it is extinguished. If a charge is paid off by a "tenant for life, without any expression of his intention, it is "well established that he retains the benefit of it against the "inheritance. Although he has not declared his intention of "keeping it alive, it is presumed that his intention was to keep "it alive, because it is manifestly for his benefit." In *Thorne* v. *Cann* (2) Lord Macnaghten said: "Nothing, I think, is better "settled than this, that when the owner of an estate pays "charges on the estate which he is not personally liable to "pay, the question whether those charges are to be considered "as extinguished or as kept alive for his benefit is simply a "question of intention. You may find the intention in the "deed, or you may find it in the circumstances attending the "transaction, or you may presume an intention from consider"ing whether it is or is not for his benefit that the charge "should be kept on foot."

Now it is important to notice the language used in these passages to describe what happens when the limited owner discharges the incumbrance. It is not that he thereby becomes

(1) (1877) 5 Ch. D. 634, 645.

(2) [1895] A. C. 11, 18.

entitled, in some account between himself and the remainderman, to be recouped what he has paid. The incumbrance is "kept alive for his benefit." This is no picturesque expression —it describes what in the contemplation of equity is the true result.

Precisely the same thing happens when an absolute owner pays off a charge, the only difference being that in his case some indication of intention to keep the charge alive is in general required, whereas in the case of the limited owner such intention is in general presumed from the circumstance that it would be for his benefit to do so. The passage cited from Lord Macnaghten deals with both cases, and with regard to each he uses the expression "keep alive the charge for his "benefit." In the case of the absolute owner the charge can be kept alive by a mere declaration of intention in the deed of reconveyance when the charge is paid off. There is no need to have the reconveyance made in favour of a nominee or to resort to any similar conveyancing device. Such a declaration sufficiently evidences the intention of the owner who pays off the charge—that indeed is its only importance—and his intention being so established the charge remains alive and can be enforced by him according to its terms. It is the same in the case of the limited owner whose intention is presumed ; the charge remains, the benefit of it becomes vested in him when he pays it off without the necessity of any assignment and he can enforce it according to its terms.

The persons interested in the corpus have no equity whatever to object to the exercise by the limited owner of the right so acquired by him. What has taken place is a matter with which they have no concern. Their position is made no worse than it would have been if the owner of the charge had himself enforced it or had assigned it to another person who enforced it. The position of the limited owner is in effect the same in the contemplation of equity as that of an assignee of the charge ; he gets those rights against corpus which the charge confers, no more and no less. This is what is meant by "keeping the charge alive for his own benefit."

In the present case the charges with which we have to deal are charges on corpus. But they are also and primarily continuing charges on income, that is to say, as between themselves and those interested in corpus the appellants as tenants for life are bound to keep them down out of the income of the property charged so far as it is sufficient for the purpose. This obligation admittedly extends so as to impose upon the tenant for life the obligation, where resort has been had to capital to make good a deficiency in any year, to reimburse capital out of surplus income (if any) in subsequent years.

It is said that these circumstances entirely alter the position of the tenant for life who pays off the deficiency out of his own money. It is said that his right to keep the charge alive for his own benefit, if it exists at all, changes its character and, so to speak, becomes a mere right to have paid to him the balance (if any) which shall be due to him after his obligation to reimburse corpus out of subsequent surpluses has been discharged. In other words, his right to keep the charge alive for his own benefit becomes, as it were, merged in a general accounting equity as between tenant for life and remainderman. This of course involves the consequence that the tenant for life cannot obtain payment during his life because it is not until his death that the account can be taken. This in effect is what Farwell J. has held in the present case.

With all respect to those who think otherwise I can find no support either in principle or in authority for this conclusion. In my opinion it ignores the true facts of the position which arises when a tenant for life pays off a charge on the estate and confuses two quite separate equities each of which arises out of entirely different and disconnected facts. The equity of the remainderman to have surpluses applied in making good to corpus what has been taken from it to meet a deficiency arises from the fact that the charge is a continuing charge on income and must be kept down out of income, so far as it is sufficient for the purpose. This equity arises where the owner of the charge has enforced it against capital—it would have arisen in the present case if the trustees on behalf of the jointress and the portioners had exercised their powers of raising the deficiency out of corpus. In respect of this equity, if the

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appellants are right, the position of those interested in corpus will be precisely the same as it would have been in that event, no better and no worse. Why in view of this the tenant for life should be penalized I must confess I am at a loss to understand. If by giving effect to the charge in favour of the tenant for life the position of those interested in corpus were to be in some way prejudicially affected in regard to this equity, different considerations would of course apply. But it will not. The equity will remain in full force, and that is because it is an equity separate from, independent of and unaffected by the right of the tenant for life to keep alive for his own benefit the charge on corpus which he has paid off. The nature and origin of that right I have already discussed. It arises not, as is the case with the other equity, out of the mutual relationship of tenant for life and remainderman as regulated by the terms of the instrument creating the charge, but out of a separate transaction altogether in which the tenant for life stands in the relationship of a third party and acquires by his action rights against corpus which had previously belonged to some one else. To deprive him of those rights or to postpone the exercise of them is a thing for which I can see no justification. It would merely impose a gratuitous hardship on the tenant for life. When the deficiency arises the tenant for life is not in default. He has discharged his obligation to keep down the charges out of income so far as as it will go. The owner of the charge is entitled to have recourse to corpus for the deficiency. If the tenant for life pays the amount of the deficiency out of his own money, why should his right to enjoy the benefit of the charge be postponed on the chance that, in some future years, there may be surplus income for which he will be liable to account ? If in the present case the trustees had raised the amount of the deficiency by mortgage, the tenant for life might well have been the lender of the money. Could it have been said that his right to enforce the mortgage ought to be postponed until it could be ascertained whether or not in subsequent years there was a surplus of income ? I apprehend not. I can see no difference in principle in the case where the money is advanced on mortgage by the tenant for life to the trustees and that where it is paid direct by the tenant for life to the chargees in such circumstances as would keep the charge alive for his benefit in accordance with general principles.

It is said that difficulties would arise if the tenant for life were to assign his charge, since the assignee would not be liable to account for subsequent surpluses. I agree that he would not. But the tenant for life would clearly remain liable, and the remainderman's rights in respect of surpluses would remain unaffected. To my mind the case of such a transfer illustrates and confirms the appellants' argument. For the resulting situation makes plain the separate and distinct natures of the two equities, the equity which the tenant for life derives through the chargee whom he has paid off, and the equity of the remainderman which arises by reason of the relationship between himself and the tenant for life under the terms of the settlement.

I have hitherto assumed that the principle under which a limited owner is entitled to have a charge kept alive for his own benefit applies to the case where the charge is (as between tenant for life and remainderman) primarily a continuing charge on income. On principle I should have thought that this was unquestionably the case. But that it is the case has, in my opinion, been recognized by the House of Lords in the case of *Kensington* v. *Bouverie* (1), which was fully discussed before us. I do not propose to refer in detail to the opinions delivered in that case, which must be read with reference to the facts with which they were dealing. But all the noble and learned Lords did, in my opinion, recognize the right of a tenant for life who, when the rents are insufficient, pays off such a charge out of his own money to keep it alive for his own benefit. The point upon which the majority and minority differed was the question whether or not upon the particular facts of the case the necessary intention to keep the charge alive ought to be imputed to the tenant for life.

Upon the question which I have been discussing I differ with all respect from the conclusions of the learned judge for reasons which sufficiently appear. His view that the tenant for life must wait until his tenancy comes to an end—or possibly until the estate is sold, an alternative which I must confess I do not quite understand—gives rise to a practical difficulty. Admittedly the tenant for life making a claim against corpus may, in some circumstances, be called upon to show that his management of the estates has not been such as to make the income from rents less than it ought to have been. If the investigation of matters of fact of this kind is to be postponed until the tenant for life is dead—possibly many years after the relevant time—insuperable difficulties of proof would arise.

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(1) 7 H. L. C. 557.

But this does not dispose of the case, for the question remains whether or not upon the facts of this case the company ought to be treated as having intended to keep the charges alive for its own benefit. It is not, I think, entirely clear in the opinions of the majority in the *Kensington* case (1) whether they considered that, in the case of a charge of this character, some manifestation of intention on the part of the tenant for life was required: see per Lord Campbell L.C. (2) and per Lord Chelmsford. (3) It was not necessary for them to decide this question, since there was in their view, upon the facts of the case, a clear manifestation of intention to the contrary. But whichever be the true view it is, I think, clear that in their opinion a very slight indication of intention to benefit the estate would be sufficient to deprive the tenant for life of the right to claim that the charge was kept alive. Lord Campbell (2) and Lord Chelmsford (4) point out the special benefit which a tenant for life obtains in keeping undisturbed possession. It is, moreover, to be remembered that, in view of the obligation which lies upon the tenant for life in the case of a continuing charge on income to apply future surpluses in making good to capital what has been taken from it, the tenant for life may well prefer to rely on the possibility of such future surpluses rather than on an immediate charge on corpus.

In the present case the deficiencies occurred in the three years ending March 31, 1933, 1934 and 1935. So far as the evidence before us goes, the first indication of any intention to keep the charges alive is to be found in the issue of the originating summons on May 25, 1936. The reason which induced the plaintiff company to make up the deficiencies is stated in para. 24 of the affidavit of Mr. Frere sworn in support of the summons as follows: "Such payment was made "in order to prevent the enforcement of the deficiency of the "said annuity and interest against the estates to the income of "which the plaintiff company is entitled." This statement of the company's objects recalls the words of Lord Campbell in the *Kensington* case. (1) I find in it and in the fact that payments were made for three years without any intimation of any kind of an intention to claim a charge on capital, compelling reasons for inferring that the company, when it made the payments, did so to protect its position as life tenant against recourse to capital by the chargees, and without any thought or intention to keep the charges alive in its favour. The idea that such a claim could be made appears to me upon the facts to be an afterthought; and assuming, without deciding, that even in regard to charges of this character a presumption of intention arises from the mere fact of payment, I am of opinion that upon the facts of this case that presumption is rebutted.

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(1) 7 H. L. C. 557.
(2) Ibid. 574.
(3) Ibid. 595.
(4) Ibid. 596.

In the result the appeal must be dismissed with costs.

MacKinnon L.J. (read by Clauson L.J.). I have come to the conclusion that this appeal must be dismissed with costs.

I have had the advantage of reading the judgment which has just been read by the Master of the Rolls, and that which is about to be read by Clauson L.J. It will be apparent that in the process of reasoning by which each arrives at the same conclusion as I do, they differ upon one point, which is among the nicest and sharpest quillets of the law as administered in Courts of equity. Since we all reach the same result, I can pretend to no regret that it is unnecessary for me to indicate my opinion upon this point of difference between them. But let no one suppose that, if it had been necessary, I should have completed the quotation from Shakespeare.

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(1) 7 H. L. C. 557.

CLAUSON L.J. I agree with the view expressed by the Master of the Rolls, that upon the facts of this case the company cannot be treated as having intended to keep the charges alive for its own benefit, and the result must be that the dismissal by the learned judge of the summons which was before him must stand, and this appeal must be dismissed with costs. I should prefer to leave untouched the question, which, in the circumstances of the case, has not yet arisen, whether if the company in the future, on making a payment towards the jointure or towards interest on the portions in excess of the figure of net income in its hands, sufficiently manifests an intention to keep alive a charge for the excess, it will have the right to have such a charge declared as a charge on the corpus, and be in a position immediately to enforce the charge or transfer it to a third party. As, however, the Master of the Rolls, differing from the views expressed by Farwell J., has expressed a clear opinion upon this question, it is but right that I should state shortly why I feel a difficulty, as at present advised, in committing myself to the same opinion.

It is of course clear that a tenant for life of a property, which is subject to a mortgage, who pays off the mortgage is entitled to keep the mortgage alive against the corpus of the estate. The mortgagee, if the mortgage had not been paid off, would be entitled to enforce the mortgage and thus obtain payment out of the corpus of the estate, not only of the capital sum charged, but also of interest accruing upon the capital sum down to payment off. I am not aware, however, that it has ever been suggested that the tenant for life, paying interest to the mortgagee without repaying the capital, is entitled to keep alive the mortgagee's charge for that interest, in the sense of treating that charge as an independent charge on corpus, which he can assign to a third party, so as to give that third party a right to enforce the charge. Would such a charge carry interest? If so the effect would be that the estate would be charged with interest upon interest, which would seem to be an anomalous result. If the charge does not carry interest, there would seem to be a capital charge created which does not carry interest; again an anomalous result. It occurs to me that the answer may be that a tenant for life is not entitled to "keep alive" an income charge, in the sense suggested by my Lord. It seems to me not impossible that the proper terms in which to formulate the rights as between tenant for life and remainderman, may be as follows:—

An equity arises (or according to circumstances may arise) in favour of the tenant for life to have recouped to him out of capital the amount by which he is found to be out of pocket (by reason of having kept down the income charges) when the period ends during which he is in receipt of the rents and profits out of which the income charge ought to be borne. If a tenant for life finds that the rents and profits are short of the sum required to meet income charges, he may leave the chargees to enforce their rights, or he may himself apply to the Court for a sale, exercising what (as appears from Tudor's Leading Cases in Real Property, 4th ed., p. 143) is the general right of parties entitled to real estate given to one for life with remainder over if the income charges exhaust the rents and profits, namely, the right to have the estate discharged by sale of the real estate. (See as to this *Cooke* v. *Cholmondeley*. (1)) Under modern conditions the tenant for life would in most cases be able to proceed to a sale without invoking the assistance of the Court. It is also open to the tenant for life to supply the deficiency out of his own pocket and to look to his equitable right to recoupment out of capital should it turn out that the future rents and profits accruing to the date when his receipt of them stops, whether by reason of a sale of the land or the termination of his life interest, leave him ultimately out of pocket. I know, however, of no practice under which (and I hesitate to commit myself to the recognition of any principle upon which) he is entitled to have an immediate charge on the estate declared in his favour for a sum (provided to meet an income charge) in respect of which he is temporarily out of pocket by reason of his own deliberate act, but which may in the event be recouped to him in due course out of future rents and profits.

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(1) (1857) 4 Drew. 244.

As, however, the point on which I hesitate to agree with my Lord does not at present arise, I think it better not to express a concluded opinion upon it.

Solicitors: *Frere, Cholmeley & Co.; Tarry, Sherlock & King; May, May & Deacon.*

W. I. C.

Considered. DOLLFUS MIEG *v.* BANK OF ENGLAND
[1950] 1 Ch. 333

HAILE SELASSIE *v.* CABLE AND WIRELESS, LIMITED.

BENNETT J.

1937
Oct. 18, 19;
Dec. 10.

1938
Mar. 2, 23.

[1937. H. No. 28.]

International law—Recognition de jure of foreign sovereign—Claim by sovereign to fund also claimed by another foreign sovereign state—Jurisdiction.

Where the de jure sovereign of a foreign country brought an action to recover a sum of money from a company and the company proved that a claim in respect of the money had been made by another foreign sovereign state:—

Held, that the Court had no jurisdiction to decide the rights of the plaintiff, having regard to the claim by the other foreign state.

The Parlement Belge (1880) 5 P. D. 197, 217, referred to.

Observations of Scrutton L.J. in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* [1921] 3 K. B. 532, 555, considered and applied.

ACTION.

The plaintiff commenced these proceedings for the purpose of obtaining an order for an account of what was due under a contract made between the Director General of Posts, Telegraphs and Telephones of Ethiopia of the one part and the defendant company of the other part, and payment by the defendant company of what should be found due on the taking of such account. The contract related to the transmission of wireless messages between an Ethiopian State radio telegraphic station at Addis Ababa in Ethiopia and a radio telegraphic station of the defendant company in Great Britain. The relevant provision of the contract was that the charges paid by the senders of telegraphic messages between the two stations should be apportioned in the proportion of two-thirds to the transmitting station and one-third to the receiving station.

As a result of the war between Italy and Ethiopia the radio telegraphic station at Addis Ababa was closed down on May 2, 1936.

At the hearing of the action the parties agreed that the sum payable by the defendant company under the contract was 10,613*l.* 11*s.* 3*d.* The only point to be decided in the action was whether, having regard to recent events in Ethiopia and to the attitude taken up by His Majesty's Government in relation to the plaintiff and to the de facto control of the Italian Government in Ethiopia, the plaintiff was entitled to recover judgment against the defendant company for the above-mentioned sum.

It was ascertained from the Foreign Office that (1.) His Majesty's Government still recognized the plaintiff as de jure Emperor of Ethiopia; (2.) His Majesty's Government recognized the Italian Government as the Government de facto of virtually the whole of Ethiopia; and (3.) that an Envoy Extraordinary and Minister Plenipotentiary from His Majesty the Emperor of Ethiopia was accorded recognition at the Court of St. James.

In addition to the claim made to these moneys by the plaintiff the defendants proved that a claim to them had been made by the Italian Government.

Andrew Clark for the plaintiff.

Wynn Parry K.C. and *H. G. Robertson* for the defendant company.

The arguments related to the legal position of a person recognized as a sovereign de jure of a foreign country of which another power is in occupation de facto. This question ceased to be material, having regard to the legal point decided by the learned judge, upon which alone this case is reported.

The following cases were referred to: *United States of America* v. *Wagner* (1); *United States of America* v. *McRae* (2); *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (3); *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (4); and *Bank of Ethiopia* v. *National Bank of Egypt and Liguori.* (5)

1938. March 23. Bennett J., after stating the facts and the nature of the action, continued:

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(1) (1867) L. R. 2 Ch. 582.
(2) (1869) L. R. 8 Eq. 69.
(3) [1921] 3 K. B. 532.
(4) [1935] 1 K. B. 140.
(5) [1937] 1 Ch. 513.

It is plain, I think, that the contract sued on was made by the Director General of Posts, Telegraphs and Telephones of Ethiopia on behalf of the plaintiff as the sovereign authority of Ethiopia. It is also, I think, plain that the rights and liabilities under the contract were not the private rights and liabilities of the plaintiff, but were the rights and liabilities of the Ethiopian Empire of which he was the sovereign head.

The plaintiff left Ethiopia in consequence of the Italian invasion on May 1, 1936, and has never since returned. He was living in England when the writ in the action was issued and he still lives here.

His Lordship then stated the result of inquiries made as to the present attitude of His Majesty's Government with regard to the position in Ethiopia, and continued: In para. 5 of the defence the defendants allege as follows: "By "letter to the defendants dated February 2, 1937, the "Italian Ambassador in London gave notice to the defendants "that the moneys claimed by the plaintiff in this action "were claimed from the defendants by the Italian Govern- "ment, and by letter to the Italian Ambassador dated "February 18, 1937, the defendants made inquiry whether "the Italian Government was willing to submit the deter- "mination of the question what party is entitled to such "moneys to the decision of the English Courts or itself to "commence proceedings in this Country against the defendants "for the maintenance of its said claim. The defendants "received an answer dated April 14, 1937, to their said "inquiry stating that the Italian Government claims such "moneys and is not prepared to admit in any circumstance "that its rights in making such claim are in any way in "doubt." The correspondence referred to in this paragraph establishes the fact that the Italian Government do claim the sum admitted by the defendants to be due from them under the contract sued on.

In addition to this plea there are two further pleas set up by the defendants in paras. 3A and 3B of their re-amended defence. These paragraphs read as follows:

" (3A). His Majesty Haile Selassie left Addis Ababa and "his former Empire of Ethiopia on or about May 1, 1936, "and has never since returned thereto by reason of the "conquest thereof by the military forces of the King of "Italy which are the armed forces of a hostile power referred "to in para. 4 of the statement of claim. On or about "May 9, 1936, the King of Italy and the Italian Government "by proclamation annexed the said Empire of Ethiopia and "since the said date have been or become and now are the "sovereign head and government thereof and in control "thereof. By reason of the premises the alleged cause of "action of His Majesty Haile Selassie has passed to and "become vested in the King of Italy and the Italian Government.

"(3B). Under the Constitution of Ethiopia the sovereign "power over the Empire of Ethiopia and all public rights "appertaining thereto were vested in the Emperor of Ethiopia "as a corporation sole or alternatively in the natural person "who is for the time being the Emperor of Ethiopia. The "claim in this action is in respect of a public right appertaining "to the sovereign power of the Empire of Ethiopia and was "by virtue of the recognition in December, 1936, by His "Majesty's Government of the Government of Italy as the "de facto Government of Ethiopia suspended or alternatively "transferred to the King of Italy as the sovereign head of "the Italian Government."

The questions of law which arise out of these pleas were debated with much enthusiasm by counsel for the plaintiff and the defendants respectively, and I do not doubt but that they are of interest and importance. I do not, however, intend to express any opinion upon them. The defendants are willing to pay the moneys they admit to be due from them to whoever may legally be entitled to receive it.

The defendants have proved that, in addition to the claim made to these moneys by the plaintiff, a claim to them has been made on behalf of His Majesty the King of Italy by his Ambassador. The defendants are unable to adopt the normal course of interpleading, since one of the claimants is the head of a sovereign state over whom this Court has no jurisdiction.

The right of the plaintiff to recover judgment cannot be determined without determining whether the claim put forward on behalf of His Majesty the King of Italy is well founded.

The *Parlement Belge* (1) establishes this proposition, "that "as a consequence of the absolute independence of every "sovereign authority and of the international comity which "induces every sovereign state to respect the independence "of every other sovereign state, each and every one declines "to exercise by means of any of its courts, any of its territorial "jurisdiction over the person of any sovereign or ambassador "of any other state, or over the public property of any state "which is destined to its public use, or over the property "of any ambassador, though such sovereign, ambassador or "property be within its territory, and therefore, but for the "common agreement, subject to its jurisdiction."

Scrutton L.J., in considering this proposition in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (2), is reported as saying that, "If by any misadventure the authorized "representative of a sovereign state should claim property "not really belonging to the state it appears to me that the "remedy is by diplomatic means between states, not by legal "proceedings against an independent sovereign," and he adds, "What the Court cannot do directly it cannot in my view do "indirectly."

If I were to give effect to the plaintiff's argument in this case I should undoubtedly be indirectly deciding against the claim put forward on behalf of His Majesty the King of Italy to the money the defendants admit they owe under the contract sued on by the plaintiff. If I may respectfully say so I entirely concur with the view expressed by Scrutton L.J. in the passage from his judgment to which I have referred.

I propose to base the order to be made in this action on the ground that a claim has been made to the moneys the plaintiff seeks to recover by His Excellency the Italian Ambassador on behalf of His Majesty the King of Italy,

(1) 5 P. D. 197, 217.

(2) [1921] 3 K. B. 532, 555.

and to hold that, having regard to that claim, I have no jurisdiction to decide the rights of the plaintiff.

The order will be as follows: the defendants having proved that a claim has been made on behalf of His Majesty the King of Italy to the moneys the defendants admit they owe under the contract referred to in the statement of claim which moneys the parties to this action admit amount to the sum of 10,613*l.* 11*s.* 3*d.* stay all further proceedings in the action.

Solicitors: *Wordsworth, Marr Johnson & Shaw; Bircham & Co.*

J. L. D.

BEAUMONT *v.* BEAUMONT.

CROSSMAN J.

1938

March 4.

[1938. B. 626.]

Infant—Custody—Proceedings begun in court of summary jurisdiction cannot be removed to Chancery Division of High Court on application of one party to the proceedings—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *ss.* 5, 9, 10—*Guardianship of Infants Act,* 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 7, *sub-ss.* 1, 2, 3—*R. S. C., Order* LV.A, *r.* 5.

Proceedings relating to the custody of an infant were commenced by the mother of the infant in a court of summary jurisdiction under s. 5 of the Guardianship of Infants Act, 1886, as amended by s. 7, sub-s. 1, of the Guardianship of Infants Act of 1925. The father of the infant, the respondent to the proceedings, then made an application under s. 10 of the Act of 1886, as amended by s. 7 of the Act of 1925, to have the proceedings removed from the court of summary jurisdiction to the Chancery Division of the High Court:—

Held, that s. 10 of the Act of 1886, as amended by s. 7 of the Act of 1925, was not applicable to proceedings commenced in a court of summary jurisdiction, and the application was dismissed.

ADJOURNED SUMMONS.

This was an ex parte application to have proceedings relating to the custody of an infant removed from a court of summary jurisdiction to the Chancery Division of the High Court. The proceedings were commenced by the mother of the infant in the Hove petty sessional court of summary jurisdiction under s. 5 of the Guardianship of Infants Act, 1886 (1), as amended by s. 7, sub-s. 1, of the Guardianship

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(1) Guardianship of Infants Act, 1886, s. 5: "The court may, upon "the application of the mother of "any infant (who may apply "without next friend), make such "order as it may think fit regard-"ing the custody of such infant "and the right of access thereto "of either parent, having regard "to the welfare of the infant, and "to the conduct of the parents, "and to the wishes as well of the "mother as of the father, and may "alter, vary, or discharge such "order on the application of either "parent, or, after the death of "either parent, of any guardian "under this Act, and in every case "may make such order respecting "the costs of the mother and the "liability of the father for the "same or otherwise as to costs as "it may think just."

Sect. 9: "In the construction "of this Act the expression 'the "'Court' shall mean—In England "the High Court of Justice or the "county court of the district in

CROSSMAN J.
1938
BEAUMONT v. BEAUMONT.

of Infants Act of 1925. (1) The application was made under s. 10 of the Act of 1886 (2), as amended by s. 7 of the Act of 1925. (1) The applicant, the respondent to the proceedings, was the father of the infant.

W. A. Fearnley-Whittingstall for the applicant. The Courts of Chancery have always had jurisdiction over matters relating to the welfare and custody of infants. That is well illustrated in *Ex parte Skinner*. (3) The Act of 1886 permitted the county courts to share that jurisdiction, if an application were made; but it gave power to either party to the proceedings to have them removed to the Chancery Division, showing thereby that the jurisdiction of the High Court prevailed over that of the county courts. That paramount jurisdiction could not be taken away, except by express words in a later statute, and no such express words appear in the Act of 1925. That Act only gave courts of summary jurisdiction a similar jurisdiction to that given to county courts by the Act of 1886, and s. 10 of that Act must apply to proceedings commenced in a court of summary jurisdiction. In the construction of a statute, words must not be construed so

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"which the respondent or respondents or any of them may reside: ". . . ."

Sect. 10: "In England and "Ireland when any application "has been made under this Act "to a county court the High "Court of Justice shall, at the "instance of any party to such "application, order such application to be removed to the High "Court of Justice and there proceeded with before a judge of the "Chancery Division, on such "terms as to costs as it may "think proper. . . . ."

(1) Guardianship of Infants Act, 1925, s. 7: "(1.) For the purposes "of the Guardianship of Infants "Act, 1886, as amended by this "Act, the expression 'the court' "shall include a court of summary "jurisdiction: . . . .

"(3.) Where on an application "to a court of summary jurisdiction under the Guardianship of "Infants Act, 1886, as amended "by this Act, the court makes or "refuses to make an order, an "appeal shall, in accordance with "rules of court, lie to the High "Court:

"Provided that, where any such "application is made to a court of "summary jurisdiction, and the "court considers that the matter "is one which would more conveniently be dealt with by the "High Court, the court of summary jurisdiction may refuse to "make an order, and in such case "no appeal shall lie to the High "Court."

(2) See note (1) ante, p. 551.

(3) (1824) 9 Moore C. P. 278.

as to take away rights existing before the statute, unless there are plain words which indicate that such was the intention of the Legislature: see Bowen L.J. in *In re Cuno*. (1) Maxwell on the Interpretation of Statutes, 8th ed., pp. 116–7, emphasizes the principle that only express words in a statute can affect the power of control and supervision which the High Court exercises over the proceedings of inferior courts. There are no words in the Act of 1925 that in any way take away the right given by s. 10 of the Act of 1886.

CROSSMAN J. This is an application by summons dated February 15, 1938, by Benjamin Beaumont, who is respondent to proceedings regarding the custody of his infant son, Anthony Pitcairn Beaumont, which have been commenced by the infant's mother in the Hove Petty Sessional Court under s. 5 of the Guardianship of Infants Act, 1886, as amended by s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925. The summons asks for an order that the proceedings in the Hove Petty Sessional Court be removed to this Honourable Court. The summons, as I understand it, is based upon s. 10 of the Guardianship of Infants Act, 1886. Sect. 5 of the Guardianship of Infants Act, 1886, so far as is material, is in the following terms: "The court may, upon the application of the mother of any "infant (who may apply without next friend), make such "order as it may think fit regarding the custody of such "infant and the right of access thereto of either parent, having "regard to the welfare of the infant, and to the conduct of "the parents, and to the wishes as well of the mother as of the "father." Then there are consequential details. Sect. 9 of the Guardianship of Infants Act, 1886, so far as it is material, is as follows: " In the construction of this Act the expression "' the Court ' shall mean—In England the High Court of "Justice or the county court of the district in which the "respondent or respondents or any of them may reside; In "Ireland the High Court of Justice or the county court of the "district in which the respondent or respondents or any of "them may reside." Sect. 10 of the Guardianship of Infants

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(1) (1889) 43 Ch. D. 12, 17.

Act, 1886, is as follows: [his Lordship read s. 10, and continued:] It is to be observed that the section I have just read gives any party to an application made to a county court an absolute right to have such application removed to the High Court. If that right is not exercised by anybody, and the county court gives a decision, then there is a right of appeal to the High Court against that decision.

That being the position under the Act of 1886, I come to the Guardianship of Infants Act, 1925, and I find that s. 7, sub-s. 1, is as follows: "For the purposes of the Guardianship "of Infants Act, 1886, as amended by this Act, the expression "'the court' shall include a court of summary jurisdiction." Then there is a proviso which limits in some detail, so far as the court of summary jurisdiction is concerned, its competency. Then sub-s. 2 enables the Lord Chancellor to make rules regulating the procedure in courts of summary jurisdiction. Then sub-s. 3 is as follows: [his Lordship read sub-s. 3, and continued:]

The applicant on this summons contends that the effect of s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925, is to make s. 10 of the Act of 1886 applicable to an application to a court of summary jurisdiction, and that he is entitled to have proceedings in the petty sessional court removed to the High Court. I am unable to accept that contention. In my judgment the effect of s. 7, sub-s. 1, of the Guardianship of Infants Act, 1925, is to extend the interpretation of the expression, "the Court," which is contained in s. 9 of the Act of 1886, so as to include in the meaning of that expression a court of summary jurisdiction, but not to extend the meaning of the expression "a county court" in s. 10 of the Act of 1886, so as to include in the meaning of the last mentioned expression a court of summary jurisdiction. It is to be observed that sub-s. 3 of s. 7 of the Act of 1925 provides expressly for an appeal from an order of a court of summary jurisdiction. This would be unnecessary if the expression "the county "court" in s. 10 of the Act of 1886 had been extended so as to include a court of summary jurisdiction, because then the appeal would already have been provided for. It is also to be observed that the proviso to s. 7, sub-s. 3, of the Act of 1925 gives the court of summary jurisdiction a power which is not given to the county court by the Act of 1886—namely, a power to consider and come to the conclusion if it thinks fit that the matter is one that can more conveniently be dealt with by the High Court. That sub-section enables the court of summary jurisdiction to decline to act, and puts the matter at large again, and leaves the applicant to come to another court for relief. Although, of course, it does not affect the construction of the Act, I note that Order LV.A of the Rules of the Supreme Court, which deals with applications under the Guardianship of Infants Acts, 1886 and 1925, provides expressly by r. 5 for the case of removal from a county court under s. 10 of the Act of 1886, but does not make any provision for the case of removal from a court of summary jurisdiction.

On the whole I am of opinion that a party to an application to a court of summary jurisdiction under s. 5 of the Act of 1886 as extended by s. 7 of the Act of 1925, has no right to insist upon the matter being removed from the court of summary jurisdiction to the High Court. In those circumstances I cannot make any order upon the present summons.

NOTE.—On March 21, 1938, the applicant applied to the Court of Appeal, abandoning the contention that the statutory right of removal applied to the case, but invoking the inherent powers of the Court of Chancery to deal with the case of infants. On opening the appeal counsel for the appellant stated that the infant was out of the jurisdiction and that he had no instructions to give any undertaking to bring him within it. Thereupon the Court declined to hear the appeal, which was accordingly dismissed.

Solicitors for applicant: *C. A. Russ & Son.*

P. J. B.

SIMONDS
J.
1938
Feb. 10,
15, 16.

In re COX (DECEASED).

PUBLIC TRUSTEE *v.* EVE.

[1937. C. 763.]

Administration—Annuities—Legacies out of residue—Estate insufficient to provide full income for annuities—Sufficient to pay actuarial value of annuities and leave residue—Annuities to be valued and value paid to annuitants.

A testator by his will bequeathed a number of pecuniary legacies, and subject thereto a number of annuities, and subject thereto gave various legacies to persons and institutions out of the residue and directed any balance that might be left to be held for the persons who would be entitled to his estate under the Administration of Estates Act, 1925. The pecuniary legacies had priority over the annuities, and the annuities over the residuary legacies, the annuities being charged upon capital as well as income. The estate was insufficient, after payment thereout of the pecuniary legacies and duties, to provide by its income alone for the payment of the annuities in full, but it was estimated that, after the sale of the real estate, there would be sufficient capital to purchase the annuities, valued on an actuarial basis, and leave a balance available for payment of the residuary legacies, subject to abatement :—

Held, that the proper course was to value the annuities, and to pay the value so ascertained to the annuitants.

The rule of *In re Cottrell* [1910] 1 Ch. 402, in which this course was followed, is applicable not only as between pecuniary legatees and annuitants, but also as between annuitants inter se and residuary legatees.

In re Grant. Walker v. *Martineau* (1883) 52 L. J. (Ch.) 552 distinguished.

SUMMONS.

The testator William Foster Cox, by his will dated February 28, 1930, appointed the Public Trustee and the defendant John Eve executors and trustees thereof. The testator then bequeathed a large number of specific legacies and pecuniary legacies to legatees whose names and addresses were set out in the first and second schedules to the will. After making certain specific devises (referred to later) the testator devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees upon trust for sale and conversion, and out of the moneys to arise from such sale to pay the legacies given by the will or any codicil thereto and the duties on all legacies and annuities given free of duty, and subject thereto to hold the proceeds of sale upon trust to pay to the persons whose names were mentioned in the third schedule to his will the annuities set opposite to their names. The annuities were twenty-four in number and some of them were subject to conditions. The testator then gave a series of directions to the trustees concerning the payment of the annuities, including the following :—

"1. The trustees may as soon as may be after any annuity "commences to accrue set apart in their names or under their "control authorized investments to provide a fund, the income "whereof will be sufficient in the opinion of the trustees to "produce an annual sum equal to the amount of the annuities "for the time being payable under my will.

"2. The income, or if necessary the capital of the fund so "appropriated, shall be applied in payment of every subsisting "annuity.

"3. Until a fund shall be so appropriated my residuary "personal estate and the net moneys to arise from the sale of "my real estate (other than certain real property specified) "shall stand charged with the payment of every subsisting "annuity, but after appropriation the estate shall be discharged "therefrom."

For the purpose of this clause annuity was to include any periodical payment for life or other terminable interest. The will then directed that all legacies and annuities should be paid and enjoyed free of duty payable at the testator's death, and proceeded as follows : " And as to all "the residue of my estate (subject to all the trusts herein-"before declared) I bequeath the same both as to capital "and income to the persons institutions and corporations "contained in the fourth schedule to the will and in the "amounts and shares set out in the third column." And if any residuary estate remained undisposed of after the residuary legatees had been paid in full the testator devised and bequeathed it to the person or persons who at his death would be entitled to his estate under the Administration of Estates Act, 1925.

The testator devised a freehold house, 65 Selwyn Avenue, Highams Park, upon trust for the defendant Jane Lancaster for her life, and after her death upon trusts declared concerning his residuary estate, and directed his trustees during the life of Jane Lancaster to pay and discharge all rates and taxes thereon, to keep the said property in good repair and to insure it against damage by fire and to pay the insurance premiums. He also devised a freehold house, 68 Cavendish Road, Highams Park, upon similar trusts for the defendant Charlotte Henderson Edge during her life and gave a similar direction as to payment of the outgoings.

The testator made a codicil dated May 25, 1935, to his will which was not material to the question raised by the summons dealt with hereunder.

The testator died on December 30, 1935, and probate of his will and codicil was granted to the Public Trustee and the defendant John Eve by the Principal Probate Registry.

The total amount of the pecuniary legacies which had not lapsed was 2475*l.* The total of the annuities bequeathed by reference to the schedule, including annual payments of 1*l.* at Christmas (but not including periodical payments for maintenance of house property), was 960*l.* The gross value of the testator's estate for purposes of estate duty was 32,405*l.*, of which 15,615*l.* represented the value of this real estate. The rate of estate duty was 11 per cent., and the executors estimated that after payment of testamentary expenses, legacies and duties thereon, and on the annuities, the total amount available to answer the annuities, including all periodical payments, would be approximately 22,000*l.* This amount was insufficient to enable the trustees to set aside and appropriate a fund capable of producing sufficient income to answer the annuities, but it was sufficient to enable the executors, having regard to the actuarial value of the annuities, to purchase such annuities. For this purpose the approximate capital sum required was estimated at 15,290*l.*

This summons was taken out by the Public Trustee to determine a number of questions arising on the construction of the testator's will and codicil, but the only one on which a report is called for is the following, namely, whether upon the true construction of the will and codicil and in the events which had happened for the purpose of paying or satisfying the annuities and bequests mentioned in the third schedule to the said will, the plaintiff and the defendant John Eve, as such trustees as aforesaid, (i.) ought in the first place to apply the income of the testator's residuary estate in or towards satisfying the annuities and bequests for the time being payable, and if such income should be deficient to make good such deficiency out of capital of the residuary estate, or (ii.) how otherwise to apportion and deal with the residuary estate of the testator as between (*a*) the annuities and bequests mentioned in the third schedule to the will, and (*b*) the legacies bequeathed out of the residuary estate to the persons, institutions and corporations mentioned in the fourth schedule.

H. Rose for the plaintiff.

L. W. Byrne for the defendant Eve.

W. G. Hart for an annuitant submitted that the question was determined by *Wright* v. *Callender* (1).

E. M. Winterbotham for other annuitants. The annuities rank in priority to the legacies in the fourth schedule. As to the rights of the annuitants, the case is really covered in principle by *In re Cottrell.* (2) That case shows that where there is a contest between pecuniary legatees and annuitants an annuitant is entitled to be paid the actuarial value of his annuity unless you can set aside a fund to produce the annuity by the income. That is to do justice between legatee and annuitant; but the same principle applies where justice has to be done between annuitants of different ages. Where there is only one annuitant there is no need for the principle; this explains *Wright* v. *Callender.* (1)

There are numerous cases where annuities have been valued: *Long* v. *Hughes* (3); *Wroughton* v. *Colquhoun* (4); *Todd* v.

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(1) (1852) 2 De G. M. & G. 652.
(2) [1910] 1 Ch. 402.
(3) (1831) 1 De G. & Sm. 364.
(4) (1847) 1 De G. & Sm. 357.

SIMONDS J.

1938

Cox, *In re.*

PUBLIC TRUSTEE *v.* EVE.

Bielby (1); *Heath* v. *Nugent* (2); *Potts* v. *Smith* (3); *In re Wilkins* (4); *In re Ross* (5); *In re Ellis* (6), but they are really decisions on how the annuities are to be valued and not on the question under what circumstances annuities are to be valued. Most of them, perhaps all, are cases where there was not enough to pay even the actuarial values. But the right of an annuitant to have the actuarial value cannot depend on that. Nor can it depend on the testator directing the setting aside of a fund to produce the annuity. For that is what a Court would do if it was administering the estate.

In re Grant (7) was not argued on behalf of annuitants; the question was between those entitled to income and capital respectively of residue.

F. E. Skone James for some of the residuary legatees. Unless it is established that the present valuation of the annuities is more than the total value of the residuary estate, no case has arisen for paying the actuarial valuation of the annuities to the persons entitled. There is nothing to prevent the trustees from carrying out the directions of the will; using the income as far as it will go, and resorting to capital for any deficiency. The decision in *In re Cottrell* (8) does not apply, because there there was a direction, and not merely a power to appropriate an annuity fund, and that direction could not be carried into effect. There is no case where the Court has ordered a lump sum to be paid to an annuitant where the estate was sufficient to pay the full actuarial value. He referred to *Wroughton* v. *Colquhoun.* (9)

Watmough for another annuitant. There are a number of annuitants of different ages, and to say that each of them can go on receiving the income, and so far as it is deficient the capital so long as it lasts, would be unfair to the younger annuitants. The older annuitants would be paid in full, but not the younger ones.

The point here raised does not appear to have arisen as

(1) (1859) 27 Beav. 353.
(2) (1860) 29 Beav. 226.
(3) (1869) L. R. 8 Eq. 683.
(4) (1884) 27 Ch. D. 703.
(5) [1900] 1 Ch. 162.
(6) [1935] Ch. 193.
(7) 52 L. J. (Ch.) 552.
(8) [1910] 1 Ch. 402.
(9) 1 De G. & Sm. 357.

between annuitants only. The rule in *In re Cottrell* (1) is applicable and enables a legatee to be paid at once. Some actuarial valuation is necessary in order to produce equality.

Humphrey H. King for other residuary legatees. In all the cases cited by counsel on behalf of the annuitants, there was either actuarial insolvency or a trust to set aside a fund to meet annuities. If the estate is actuarially solvent, that means there is enough to buy the annuities and to leave some residue. The estate is sufficient to carry out the testator's intentions to pay annuities out of income with some resort to capital. The Court cannot upset the testator's dispositions, merely on the ground that some of the beneficiaries might be unfairly treated if they were carried into effect. An inquiry should be ordered similar to that in *In re Grant.* (2)

If the decision in *In re Cottrell* (1) is applied, the residuary legatees will get much less than they otherwise would, and in any case would be deprived of the speculative interest they are entitled to arising from the possible earlier death of annuitants. If the value of the annuities is paid out to the persons entitled, the result will be that the residuary legatees will get little or nothing.

S. M. Krusin, H. L. A. Hart, M. G. Hewins, J. H. Boraston and *J. T. Edgerley* for other defendants in various interests.

Andrewes Uthwatt for the Attorney-General.

SIMONDS J. [after stating the terms of the will, proceeded :] Two things are clear : (1.) That the pecuniary legacies have priority over the annuities, so that there is no competition between these ; (2.) That as a matter of construction of the will the annuities are to be paid before there is any residue out of which the sums mentioned in the fourth schedule can be paid. The estate, which consists to a considerable extent of real property, the value of which is necessarily speculative, is clearly inadequate, by its income, after the pecuniary legacies have been paid, to provide for the annuities given by the will, and it must be regarded as uncertain whether, if it were realized, it would be adequate to provide for the

(1) [1910] 1 Ch. 402.

(2) 52 L. J. (Ch.) 552.

payment of the actuarial value of the several annuities. In these circumstances the question which arises is one between the annuitants on the one hand and the residuary legatees on the other, and the contest is whether the annuitants are entitled to have their annuities actuarially valued and the amount of such valuation paid out to them.

As between pecuniary legatees and annuitants the rule of administration is clear that where the estate is inadequate to provide for the payment of both in full it is necessary to have a valuation of the annuities, and the pecuniary legatees and the annuitants are entitled to have paid to them their legacies and the amount of the valuation of the annuities pari passu. It is also clear that where the contest is not between pecuniary legatees and annuitants, but between an annuitant and the residue, the annuitant is not entitled to have his annuity valued and the amount of the valuation paid to him. The reason is obvious. The annuitant is entitled as between himself and the residuary legatee to have the whole income and, so far as is necessary, the corpus applied in payment of the annuity; the residuary legatee can get nothing until the annuity is paid in full: see *Wright* v. *Callender.* (1) But the annuitant can get nothing more than this.

The case before me, however, is one in which there is no competition between pecuniary legatees and annuitants, because the pecuniary legacies have priority, nor between a single annuitant and residue. The question here is whether, in order to do justice between annuitants inter se, it is necessary that their annuities should be valued and the amount of the valuation paid out to them. It is I think quite clear that where the estate is inadequate to provide the actuarial amount of the annuities according to a proper valuation, then they are entitled to have their annuities valued and the available estate distributed among them rateably according to that value: see *Todd* v. *Bielby* (2); *Heath* v. *Nugent* (3), and *In re Wilkins.* (4)

(1) 2 De G. M. & G. 652.
(2) 27 Beav. 353.
(3) 29 Beav. 226.
(4) 27 Ch. D. 703.

The reason is clear from a hypothetical example. Suppose an annuity of 100*l.* is bequeathed to one annuitant, A, who is ninety years of age, and a similar annuity to another, B, who is nineteen years of age, and suppose that the whole estate available for satisfaction of the annuities is only 1000*l.* If both the income and the capital of that sum are applied year by year until it is exhausted in payment of the two annuities, A will probably get his annuity paid in full for the whole of his life, but B will not do so. There is thus an inequality in this treatment which the testator is presumed not to have intended. The only fair way of dealing with annuities as between annuitants of different ages is to make an actuarial valuation of the annuities, and to pay the value of each so ascertained to the annuitants, as was done in the cases last cited.

The argument before me has, however, turned on this point. Assume that to be the rule where the estate is actuarially insolvent, why should it be so where the estate is actuarially solvent but inadequate to provide by its income for the annuities ? I think that the answer is to be found in an authority which binds me, the decision in *In re Cottrell.* (1) In that case the testatrix by her will, after giving pecuniary legacies to an aggregate amount of 200*l.*, bequeathed to her husband an annuity of £1 a week, and directed her trustees to appropriate such a sum as would when invested produce an annual sum equal to the amount of the annuity, and to apply the income or (if necessary) the corpus of the fund so appropriated in payment of the annuity, the sum on the dropping of the annuity to fall into and form part of her residuary estate. The estate was realized and the trustees had in their hands the sum of 1250*l.* Now comes the fact which was of vital importance. That sum was insufficient to pay the pecuniary legacies in full and to enable a sufficient sum to be set aside and invested in trust securities to produce the annuity. It was, however, sufficient to pay the pecuniary legacies in full and the value of the annuity as at the date of the death of the testatrix. Warrington J. held that the

(1) [1910] 1 Ch. 402.

proper course was to value the annuity as at the death of the testatrix according to the Government scale, to pay the amount of such valuation to the annuitant, and to pay the pecuniary legacies in full. The learned judge thought that thus only could justice be done to all three classes of beneficiaries: the legatees would be paid in full, the annuitant would get the value of his annuity, and there would remain a residue to which the residuary legatee would be entitled.

Logically I can see no reason why, if that is the rule to be followed where there is competition between legatees and an annuitant and the residuary legatees as in *In re Cottrell* (1) it should not also be the rule where the competition is between annuitants inter se and residuary legatees. To introduce a different rule in the latter case is a refinement which is calculated to cause confusion. Therefore I propose to follow, not to distinguish, *In re Cottrell* (1). It was contended that in *In re Grant* (2) a different view was taken. In that case Pearson J. directed an inquiry whether, having regard to the fact that the annuitants would be at liberty to resort to capital, if necessary, for the payment of their annuities, the same would be sufficiently secured by the funds remaining in Court after payment of the legacies in full, and it is said that this form of inquiry is not consistent with the right now claimed for the annuitants. But it must be observed, first, that the order of Pearson J. was not made in the presence of the annuitants and, secondly, that Warrington J. had his attention drawn to the case and treated it as one in which the question was between tenant for life and remainderman, as indeed it clearly was. There is, therefore, nothing in *In re Grant* (2) which can detract from the force of *In re Cottrell* (1) as an authority binding upon me.

It has, however, been argued before me that *In re Cottrell* (1) is to be distinguished because there the testatrix gave a direction to set aside a sum sufficient to provide the income for the payment of the annuity, whereas here no such direction but only an authority was given. I do not think that that makes any difference to the principle of that decision. It is a common experience to find executors coming to the Court for directions whether they ought to appropriate and set aside funds to meet an annuity, and such a direction in a will saves them the trouble of doing so. Such a direction is not for the benefit of the annuitant, but is intended to assist the executors in distributing the residue. I cannot distinguish this case in that respect from *In re Cottrell* (1), and I must hold that the annuitants are entitled to have their annuities valued as from the date of this order and to have the value of the annuities paid out to them.

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(1) [1910] 1 Ch. 402.

(2) 52 L. J. (Ch.) 552.

Solicitors: *Bentleys, Stokes & Lowless, for D. G. Verney, Brandreth & Iles, Southend-on-Sea; Ashley, Tee & Sons; Stileman, Underwood & Taylor; The Treasury Solicitor.*

(1) [1910] 1 Ch. 402.

H. L. L.

SIMONDS
J.

1938
March 2.

In re FROY (DECEASED).

FROY *v.* FROY.

[1937. F. 1834.]

Will—Construction—Gift to compound class at specified date—"To be "divided among children then living or the issue of a deceased child"—Whether grandchildren entitled as joint tenants or tenants in common—Condensed clause—Double words of severance not necessary to import tenancy in common.

The rule stated in Jarman on Wills, 7th ed., at p. 1772, that, where there is a gift to a compound class consisting of children and the issue of any deceased child who should have died leaving issue, there must be double words of severance, if a tenancy in common is to be imported not only among the children, but also among the grandchildren, does not apply where the gift is in such a condensed form that words of division can readily be construed as applying not only to the original class of children, but to any substituted issue.

Crosthwaite v. *Dean* (1879) 40 L. T. 837 followed and applied.
In re Sibley's Trusts (1877) 5 Ch. D. 494 distinguished.

SUMMONS.

The testator, William Nathaniel Froy, by his will dated January 22, 1897, having appointed executors and trustees, directed his trustees to stand possessed of his residuary estate upon the following trusts: subject to the payment of certain annuities, to each of his two sons one-quarter of the estate absolutely, and as to the remaining two-fourths upon trust for his two daughters equally. The shares of the two daughters were settled upon them for their lives and after their deaths for their children equally at twenty-one or marriage with power to each daughter who should die without issue by will or codicil to appoint for the benefit of any husband who might survive her one-half or less of the annual income of her share, and "in case of any such appointment "the trusts and powers hereinbefore limited to take effect on "the death of any such daughter so appointing shall as to "that portion take effect only after the death of such "husband and the share of such daughter dying without "issue of the unappointed part shall fall into and form part "of my residuary estate and be divided among my children "then living or the issue of a deceased child, and on the "death of such husband the residue shall be so divided and "applied."

The testator died on June 4, 1897, and his will was duly proved by the surviving executors named therein on August 24, 1897. The testator's widow, Rebecca Froy, died on December 8, 1913. The testator left surviving him four children, two sons, Herbert Pigott Froy and David Stanley Froy, and two daughters, Florence Rebecca Dickins and Caroline Elizabeth Dunfee. David Stanley Froy died on December 15, 1922, leaving one son, Dudley Froy, and Mrs. Dunfee died on June 5, 1922. Mrs. Dickins died without issue on July 17, 1937, and the summons was taken out to decide certain questions as to how upon the true construction of the will the share settled upon her ought to be divided. At the date of the summons the property and investments representing Mrs. Dickins' share were approximately of the value of 34,000*l*. Mrs. Dunfee left surviving her four children—namely, Vickers Claude Dunfee, the defendant Jack Lawson Dunfee, Beresford Clive Dunfee, and the defendant Geoffrey Edgar Dunfee. All these had attained the age of twenty-one, but none of them had any children.

By a settlement dated February 22, 1932, Vickers Claude Dunfee settled all the share and interest to which he then was or might become entitled under the will of the testator upon certain trusts.

Beresford Clive Dunfee died intestate on September 22, 1932, and letters of administration to his estate were granted on November 22, 1932, to his widow, the defendant Feodora Kathleen Alice Dunfee.

The summons asked whether on the true construction of the will and in the events which had happened the share of the residuary estate of the testator settled upon Mrs. Dickins was as from her death held in trust (*a*) for the defendant Herbert Pigott Froy to the exclusion of other persons; (*b*) as to one-half thereof for the defendant Herbert Pigott Froy, and as to the other half for all the children of David Stanley Froy and Mrs. Dunfee as tenants in common in equal shares; (*c*) as to one-third for the defendant Herbert Pigott Froy, as to one-third for Dudley Froy, the only child of David Stanley Froy, and as to the remaining third for all the children of Mrs. Dunfee as tenants in common in equal shares or as joint tenants, or alternatively for all the children of Mrs. Dunfee living at the date of the death of Mrs. Dickins.

Other alternative methods of division of the share of Mrs. Dickins were suggested, but his Lordship decided that the share was divisible into thirds—namely, one-third to the defendant Herbert Pigott Froy, one-third to Dudley Froy, and the remaining third to the children of Mrs. Dunfee.

The only point calling for a report is as to the ultimate division of the one-third share of Mrs. Dunfee's children, i.e., whether it vested in all her children as tenants in common, or as joint tenants so that in the latter case on the death in 1932 before Mrs. Dickins of Beresford Clive Dunfee his share would survive to and vest in his three brothers who survived Mrs. Dickins.

E. M. Winterbotham for the plaintiffs.

H. B. Vaisey K.C. and *G. P. Slade* for the defendant Herbert Pigott Froy.

Neville Gray for the Legal & General Insurance Company, assignees of the share of Dudley Froy.

F. R. Evershed K.C. and *G. D. Johnston* for the trustees of the settlement made by Vickers Claude Dunfee.

Geoffrey Cross for the defendant Feodora Kathleen Alice Dunfee, widow of Beresford Clive Dunfee.

There is a rule of construction stated in Jarman on Wills, 7th ed., at p. 1772, that where there is a gift to a compound class, for example to A. for life and at his death to be divided amongst his children then living and the issue of children then dead, the issue to take their parents' share, only the children take as tenants in common, and double words of severance are required to enable the issue, as well as the children, to take as tenants in common, and failing such words, they will take as joint tenant: see *Bridge* v. *Yates* (1) and other cases cited in Jarman at p. 1767; *In re Yates.* (2)

But if there is such a rule, it can at all events only apply to gifts in a full form where the express provision that issue are to take only their parents' share affords an opportunity for a second word of severance. In a short form of gift like this it is practically impossible to insert double words of severance, and the single words must apply to all members of the class.

A decision to this effect was given by Fry J. in *Crosthwaite* v. *Dean.* (3) A similar decision was given by Page Wood V.-C. in *Penny* v. *Clarke* (4), and it is submitted that that decision was correct.

Charles Harman K.C. and *T. A. C. Burgess* for the other children of Mrs. Dunfee.

The rule stated in Jarman applies. The decision in *Crosthwaite* v. *Dean* (3) is contrary to the whole current of authority and should not be followed: see *In re Sibley's Trusts* (5) and *In re Yates.* (6)

SIMONDS J. I have already decided that one-third of the share of the deceased daughter Mrs. Dickins goes to the issue of the deceased daughter Mrs. Dunfee and the further question which I have now to determine is whether that one-third which so goes to the issue or the children of Mrs. Dunfee goes to them as tenants in common or as joint tenants.

The inclination of my opinion, until I had heard Mr. Cross, was that there was a rule of construction which really compelled me to adopt the view that the issue of Mrs. Dunfee took that share between them as joint tenants and not as tenants in common, because it appeared to me that this was a case in which the principle must be applied, that where

(1) (1842) 12 Sim. 645.
(2) [1891] 3 Ch. 53, 58.
(3) 40 L. T. 837.
(4) (1859) Johns. 619, 622.
(5) (1877) 5 Ch. D. 494.
(6) [1891] 3 Ch. 53.

you have a compound class consisting of children and other issue there must be double words of severance if the tenancy in common is to be imported, not only into the gift to the children, but also into the gift to children of children.

After examining the authorities to which Mr. Cross has called my attention I see no reason why I should not follow the decision of Fry J. in the case of *Crosthwaite* v. *Dean* (1), where the gift was of a sum of stock to be divided between the brothers and sisters of the said Jane Lee or their children, words which are so close to those I have to consider that I think I should be bound to follow his decision unless it was clearly contrary to a current of authority. It is suggested that Fry J.'s decision is contrary to the current of authority and in particular to the authority of such cases as *Penny* v. *Clarke* (2); *Bridge* v. *Yates* (3); and *In re Sibley's Trusts.* (4) I must observe that Fry J. had *Penny* v. *Clarke* (2) and *In re Sibley's Trusts* (4) before him when he decided as he did the case of *Crosthwaite* v. *Dean* (1), and I think I am bound to hold, as he did, that double words of severance are not necessary where you have a gift in shorthand such as he had there, and as I have here. It is not a case in which, a compound class being the object of the testator's bounty, the testator has gone on to say that the children of children, that is to say, the substitutionary class, are to take between them their parents' share. Where that is said, the testator has defined, and is presumed to have defined completely, what is the nature of the interest which they take. He has said they are to take their parents' share; he has not gone on to use words which import they are to take as tenants in common and not as joint tenants. But where there is a compound class, created by such words as are used here and were used in *Crosthwaite* v. *Dean* (1), then it appears that that consideration does not arise; you have words of severance with which the gift opens and which can properly be construed as applying equally to substitutional as original shares. Therefore, contrary to the opinion I first formed, I hold that the gift to the

(1) 40 L. T. 837.
(2) (1860) 1 De G. F. & J. 425.
(3) 12 Sim. 645.
(4) 5 Ch. D. 494.

issue of Mrs. Dunfee is a gift to those issue as tenants in common. Consequently the child now deceased took a vested share, one-fourth of the one-third which went to Mrs. Dunfee's issue, and that share is now vested in his personal representative.

Solicitors: *Hewitt, Woollacott & Chown; Walter, Burgis & Co.; Lawrence, Graham & Co.; Baddeley, Wardlaw & Co.*

H. L. L.

SIMONDS J.

1938

March 3, 4, 8, 9, 10.

REFUGE ASSURANCE COMPANY, LIMITED *v.* PEARLBERG.

[MANCHESTER DISTRICT REGISTRY.]

Mortgage—Mortgagees in possession—Appointment of receiver—Possession taken by receiver before appointment executed—Power of mortgagee in possession to appoint receiver—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 101, *sub-s.* 1 (*iii.*); 109. (1)

The power conferred on a mortgagee by s. 101, sub-s. 1 (iii.) (1), of the Law of Property Act, 1925, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property or any part thereof, may be exercised after the mortgagee has gone into possession.

Anchor Trust Colliery Co., Ld. v. *Bell* [1926] Ch. 805 followed.

SUMMONS.

The summons was taken out by the plaintiffs under O. 55, r. 5A, asking for the foreclosure or sale of certain property mortgaged by the defendant to them. An order was made in the action, by Bennett J., dated June 10, 1937, for accounts and inquiries in the usual form, including an inquiry whether the plaintiffs had entered into possession of the mortgaged premises, and in the event of an affirmative answer to that question, that accounts of rents and profits

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(1) Law of Property Act, 1925, s. 101, sub-s. 1: "A mortgagee, "where the mortgage is made by "deed, shall, by virtue of this Act, "have the following powers, to the "like extent as if they had been in "terms conferred by the mortgage "deed, but not further (namely) ". . . .

"(iii.) A power, when the mortgage money has become due, to "appoint a receiver of the income "of the mortgaged property, or "any part thereof; or if the "mortgaged property consists of "an interest in income, or of a "rent charge or an annual or other "periodical sum, a receiver of that "property or any part thereof."

Sect. 103: "A mortgagee shall "not exercise the power of sale "conferred by this Act unless and "until—

"(i.) Notice requiring payment "of the mortgage money has "been served on the mortgagor "or on one of two or more mortgagors, and default has been "made in payment of the mortgage money, or of part thereof, "for three months after such "service; or

"(ii.) Some interest under the "mortgage is in arrear and unpaid after becoming due . . . ."

Sect. 109: "(1.) A mortgagee "entitled to appoint a receiver "under the power in that behalf received should be taken on the footing of wilful default. The issue whether or not the plaintiffs had gone into possession was referred by the registrar to the judge.

Proceedings having been taken upon this order, the form of inquiry was altered and enlarged as follows: an inquiry whether the plaintiffs had gone into possession of the mortgaged property at any time, and if so how long they remained in possession; this form of inquiry being necessitated by the facts and the questions of law raised on the summons.

The action concerned three mortgages, each being a charge by way of legal mortgage created by deed, the mortgagor being the first defendant, Henry Hyman Pearlberg, and the mortgagees being the plaintiffs, the Refuge Assurance Co., Ld. The first mortgage, dated December 21, 1926, was of property in East Street, Manchester, the sum secured being 17,000*l.*; the second dated October 2, 1928, of property in Moseley Street, Manchester, to secure 15,000*l.*, and the third, dated November 21, 1928, of property in Dickinson Street, Manchester, to secure 40,000*l.* The last named premises were also subject to a second mortgage vested in the second defendant, Beatrice Pearlberg, the wife of the first defendant.

Interest on these mortgages having fallen into arrear, the plaintiffs, on October 23, 1931, having previously given instructions for a deed appointing a receiver to be prepared, put a Mr. Roberts into possession of the mortgaged premises, intending so to put him in as receiver under the statutory powers contained in the Law of Property Act, 1925. The deed so appointing him receiver, though it bore date

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"conferred by this Act shall not "appoint a receiver until he has "become entitled to exercise the "power of sale conferred by "this Act, but may then, by "writing under his hand, appoint "such person as he thinks fit to "be receiver.

"(2.) A receiver appointed under "the powers conferred by this "Act, or any enactment replaced "by this Act, shall be deemed to "be the agent of the mortgagor; "and the mortgagor shall be solely "responsible for the receiver's "acts and defaults unless the mortgage deed otherwise provides."

October 23, 1931, was not in fact signed, sealed and delivered by the plaintiffs until November 11, 1931, nineteen days later, during which period Roberts was in possession of the mortgaged premises, and he continued in possession afterwards.

The learned judge found as facts (1.) that the interest on the East Street and Moseley Street mortgages was two months in arrear on October 23, 1931, and therefore that the statutory power of appointing a receiver had arisen, (2.) that the interest on the Dickinson Street mortgage was not then two months in arrear, but became so in arrear on October 24; therefore as regards the latter property the right to appoint a receiver had not arisen when possession was taken by Roberts on October 23, and did not arise until October 24. The result was that, as the plaintiffs admitted, and his Lordship found, the plaintiffs had gone into possession of the mortgaged premises by Roberts as their agent on October 23, 1931, that they remained mortgagees in possession from October 23 to November 11, 1931, and that as from the latter date, if the plaintiffs had power to do so, Roberts had been duly appointed receiver of the premises and the rents and profits thereof. The question, which alone calls for a report of the case, was then argued—namely, whether the plaintiffs having entered as mortgagees into possession of the mortgaged premises could appoint a receiver on November 11. The plaintiffs contended that they had power to do so, the defendants that they could not.

Alexander Grant K.C. and *H. S. Barker* for the plaintiffs. The plaintiffs never intended to go into possession as mortgagees, but to appoint a receiver. Roberts, taking possession before he was appointed, was either a trespasser or an agent of the mortgagees. If he was an agent of the mortgagees, they were in possession of all the mortgaged property from October 23 to November 11, 1931, when the deed appointing Roberts receiver was executed. A legal mortgagee can appoint a receiver whether in possession or out of possession under s. 101, sub-s. 1 (iii.), (1) of the

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(1) See note (1) ante, p. 572.

Law of Property Act, 1925. On the question whether, on the application of a mortgagee in possession, the Court will appoint a receiver of the mortgaged property, there is a conflict of authority. Pearson J. in *Tillett* v. *Nixon* (1), held that he could do so, but North J. in *In re Prytherch* (2) held that he could not, as, in his opinion, a mortgagee in possession could not go out of possession whenever he pleased, and thereby put the mortgagor to the expense of a receivership. *Tillett* v. *Nixon* (1) was not referred to in the judgment.

See also *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Co., Ld.* (3).

The decision in *Tillett* v. *Nixon* (1) was followed in *Anchor Trust Colliery Co., Ld.* v. *Bell* (4).

Sect. 101, sub-s. 1 (iii.) (5), of the Law of Property Act, 1925, gives an absolutely general power to mortgagees, whether in possession or out of possession, to appoint a receiver.

Hon. Sir Stafford Cripps K.C. and *H. Burton* for the defendants.

At the date of the purported appointment of the receiver on October 23, 1931, two months' interest on the Dickinson Street mortgage was not due, and the plaintiffs therefore had no right to appoint a receiver. Whatever Mr. Roberts did must be treated as the act of the plaintiffs who sent him there.

The question whether a mortgagee in possession can appoint a receiver has never been exactly decided, and there is a difference of opinion as to whether the Court will appoint one at the instance of the mortgagee in possession. North J. said in *In re Prytherch* (2) that he had never known a case in which it had been held that a mortgagee could go into and then out of possession just as he wished. Sect. 101 of the Law of Property Act, 1925 does not alter the law on the point. The Court, however, can appoint a receiver, but has a discretion in the matter. *Anchor Trust Colliery Co., Ld.* v. *Bell.* (4) If the receiver was not entitled to take possession, then he must be deemed to have been a trespasser. But the evidence as to a notice board shows that the mortgagees had taken over the management and control of the property.

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(1) (1883) 25 Ch. D. 238.

(2) (1889) 42 Ch. D. 590.

(3) [1895] 1 Ch. 629.

(4) [1926] Ch. 805.

(5) See note (1), ante p. 572.

Grant K.C. in reply. In *Mason* v. *Westoby* (1) Bacon V.-C. held that a mortgagee in possession was entitled to appoint a receiver. Whatever was the law before then, full power is given by s. 101 of the Law of Property Act, 1925.

SIMONDS J. after stating the facts and findings as set out above, proceeded: A nice question of law then arises. Could the plaintiffs, notwithstanding that they were mortgagees in possession, appoint a receiver of the mortgaged premises on November 11. That is a matter on which there is some, but perhaps I may say all too little, authority. Before I examine the authorities I must observe that the question is one purely of construction of the Law of Property Act, 1925. The statutory power given to a mortgagee to appoint a receiver is contained in s. 101, sub-s. 1 (iii.), of the Law of Property Act, 1925, By that section: " A mortgagee, where the mortgage is made "by deed, shall, by virtue of this Act, have the following "powers to the like extent as if they had been in terms conferred "by the mortgage deed, but not further (namely)," (1.) a power when the mortgage money has become due to sell; (2.) a power at any time after the date of the mortgage deed to insure; (3.) a power when the mortgage money has become due to appoint a receiver of the income of the mortgaged property, or any part thereof; (4.) a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting. In the case of three of those four several powers given to a mortgagee under the statute there is no limit, there is no qualification, whether the mortgagee is or is not in possession. As to the fourth there is an express limitation. It is a power exercisable only while the mortgagee is in possession to cut and sell timber.

Merely as a matter of construction of the statute it appears to me that I should be driven to the conclusion that this power, which is unlimited in its terms, is exercisable by a mortgagee whether he is or is not in possession. That is the conclusion to which I should come unaided by any authority. It is necessary, however, to look at three authorities. In *Tillett* v. *Nixon* (1) a legal mortgagee being in possession of the mortgaged property applied to the Court for the appointment of a receiver. Let me pause there to observe that it is not therefore a direct authority for the proposition which I have to consider, for there the question was of the right of a mortgagee to go to the Court and ask the Court to appoint a receiver. The question of his own statutory power to appoint a receiver did not expressly arise. But in the course of his judgment Pearson J. said (2): "I have always thought it a very hard case that a "legal mortgagee under the old law had no right to come to the "Court and ask for a receiver of the mortgaged property. "Now, however, under the Judicature Act the Court is "authorized to appoint one, where it could not previously have "done so." Then come these words: "I have no doubt the "mortgagee might appoint a receiver under the Conveyancing "Act, without coming to the Court, but when an action "for foreclosure is pending, and the parties are at arm's length, "it is much more desirable that the receiver should be appointed "by the Court." That is not an authority, but it is a dictum by a judge very learned in real property law, that a mortgagee (he means there a mortgagee in possession) might appoint a receiver under the Conveyancing Act, 1881. It is to be observed that the terms of that Act are in this respect identical with those of the Law of Property Act, 1925.

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(1) (1886) 32 Ch. D. 206.

In the next case, *In re Prytherch* (3) where, again, the precise point which I have to determine was not before the Court, North J. had to consider the application of a mortgagee in possession for the appointment of a receiver. After dealing with the facts showing that the mortgagee had been mortgagee in possession for a number of years, North J. said: (4) "Now "it is proposed that he should be allowed to give up possession, "and that a receiver should be appointed. As regards giving "up possession, I am not aware that a mortgagee, who has "exercised his right of taking possession of the mortgaged

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(1) (1883) 25 Ch. D. 238.
(2) Ibid. 239.
(3) 42 Ch. D. 590.
(4) Ibid. 599.

"property, has any right to give up that possession whenever "he likes. He may take possession whenever he pleases, and "if, when he has elected to take possession, he may give it up "again, it is clear that he may take possession again, and, then, "if the contention is well founded, he may give it up again. "I have never heard it suggested, nor do I think it is the law, "that a mortgagee is entitled to go into and out of possession "whenever he likes. In my opinion, when he once takes upon "himself the burden which is imposed on all mortgagees who "are in possession, he must continue to perform the duty, and "he cannot when he pleases elect to give it up. I am satisfied "that, if there were any such right, some authority to that "effect would have been produced. None, however, has been "cited to me, nor have I been able to find such authority "referred to in any of the text-books which I have looked at "myself."

That is what North J. had to say about a mortgagee in possession going out of possession. The argument is that if a mortgagee in possession cannot go out of possession, so also he cannot appoint a receiver, which appointment, in effect, gets rid of his liability and throws it back on the mortgagor, since the receiver is deemed to be the agent of the mortgagor. It is to be observed that North J., though indeed *Tillett* v. *Nixon* (1) appears to have been cited in argument, does not deal expressly with the observations of Pearson J. It is clear, however, that those two learned judges were in direct conflict on this point.

In that state of the law *Anchor Trust Colliery Co., Ld.* v. *Bell* (2) came before P. O. Lawrence J. Again, the exact point which I have to determine was not before the Court, for the issue there was complicated by a consideration of the Courts (Emergency Powers) Act—which, perhaps fortunately, is no longer in operation to perplex and confuse. But in that case the learned judge had expressly to consider what was the position of a mortgagee in possession, and he said (3) : " A point was taken "on behalf of the defendants that, having once entered into

(1) 25 Ch. D. 238.
(2) [1926] Ch. 805.
(3) Ibid. 817.

"possession, Mrs. Bell could not at her own pleasure go out of "possession again, and that the appointment of Mr. Martin as "receiver was therefore invalid and nugatory, and that she in "fact remained a mortgagee in possession up to the time when "she purported to sell. In support of this contention *In re* "*Prytherch* (1) was cited. In that case North J. held that "a mortgagee, once having gone into possession, had no right "to give up that possession at pleasure. The plaintiffs, in "answer to this contention, referred to the case of *Tillett* v. "*Nixon* (2), where Pearson J. stated that he had no "doubt that a mortgagee in possession might appoint a receiver "under the Conveyancing Act. In view of the unrestricted power "conferred by s. 19, sub-s. 2, of the Conveyancing Act, 1881, "I respectfully concur in the opinion expressed by Pearson J. "In *In re Prytherch* (1) North J. was not considering the "power of a mortgagee in possession to appoint a receiver "under the Conveyancing Act, 1881, but was dealing with the "question of a mortgagee in possession desiring to give up that "possession by procuring the Court to appoint a receiver."

Therefore I have this, that a learned judge, so short a time ago as 1926, having before him these two cases, and having carefully considered and weighed the opinions of his predecessors, came to the conclusion that a mortgagee in possession has a statutory power to appoint a receiver.

I think, whatever my own view was on the matter, that I should be bound to follow and adopt the judgment of Lawrence J. in that case, and I do so the more willingly because, on my own view of the construction of the Act of Parliament, it would not be right to limit the power of a mortgagee, which, according to the terms of the Act, is unqualified, so that that power could only be exercised so long as he did not go into possession. Accordingly, the position as I see it is this, that the mortgagees here were in possession until November 11, when they executed a proper deed appointing a receiver, and as from that date they were no longer in possession, but the possession was the possession of the receiver as agent for the mortgagor.

The result is that from October 23 to November 11, the

(1) 42 Ch. D. 590.

(2) 25 Ch. D. 238.

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plaintiffs were mortgagees in possession, and they must account on that basis. On November 11 they ceased to be mortgagees in possession, and the possession was that of the receiver, as agent for the mortgagor, and as from that date the account will be taken on that basis.

Solicitors: *W. P. Green, Manchester; Rees M. Rees, Salford.*

H. L. L.

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Jan. 25, 26; *Feb.* 24, 25; *March* 16.

In re VAUX.

NICHOLSON *v.* VAUX.

[1927. V. 473.]

Will—Ademption—Legacies to children—Subsequent settlement of shares on children—Failure of residuary gift—Partial intestacy—Rule against double portions—Ademption of legacies pro tanto—Applied so as to benefit only children of testator.

A testator by his will gave legacies of investments to the value of 20,000*l.* to each of his two daughters, and then settled the residue of his estate for the benefit of his four children upon trusts which the Court held were void for perpetuity. He subsequently settled shares in a company of considerable value equally upon his four children:—

Held, that the rule against double portions was applicable so that the legacies must be adeemed pro tanto to the extent of the value of the shares settled on the daughters. But the rule must be applied for the benefit of children only, and not so as to increase any share of residue to which the widow of the testator became entitled on his death intestate as to such residue.

The rule so laid down in *Meinertzagen* v. *Walters* (1872) L. R. 7 Ch. 670, applies as well to the ademption of a legacy as of a share in the residue.

Dicta of James and Mellish L.JJ. to the effect that if the residue is increased by the application of the rule, it is so increased for the benefit of all persons entitled, dissented from.

In re Heather [1906] 2 Ch. 230 followed and applied.

SUMMONS.

The testator, Colonel Ernest Vaux, made his will dated November 27, 1919, and thereby devised and bequeathed his residuary real and personal estate to his trustees upon trust to pay the income thereof to his wife during her life or her widowhood, and in the event of her re-marriage she was to receive an annuity of 500*l.* a year. From and after the death or re-marriage of his wife and subject to the said annuity the trustees were to hold the residuary trust fund upon trust to set aside and appropriate for each of his daughters who should be living at the time of his death, investments of the value of 20,000*l.*, and these legacies of 20,000*l.* were then settled on the usual trusts. Subject to the provision of these legacies the trustees were to stand possessed of the residuary estate upon discretionary trusts as to both capital and income for the benefit of his children and the issue of any deceased child. This was followed by clauses giving special powers to the trustees to pay away and deal with both capital and income of the trust fund as they might think best, save that all such dealings with the capital and income and accumulations should be within the limitations prescribed by law, and certain expressions of "intention" but without legal obligation.

On September 9, 1924, the testator settled 8000 6 per cent. preference shares of 5*l.* each in C. Vaux & Sons, Ld. (a private company) upon his four children, two sons and two daughters, with cross remainders between them. Each daughter, by this settlement had settled upon her shares of the value of over 10,000*l.* The testator died on November 25, 1925, and his will was proved by the executors and trustees thereof in 1926. The summons was taken out in 1927 to decide questions arising in the administration of the testator's estate, and having stood over generally had been amended to raise certain questions of construction arising on the will and the settlement of 1924.

Simonds J. decided (1.) that the legacies of 20,000*l.* to the testator's daughters, and the settlement on each of them of 2000 shares in the company were portions so as to bring in the rule against double portions, and (2.) that the residuary gift in the will infringed the rule against perpetuities, and was void, and therefore that the testator died intestate as to the residue of his estate. The question was then argued whether the rule against double portions applied to the case of a partial intestacy, and if so whether it ought to be applied so as to increase the share in the residue taken by the widow of the testator, or whether it was only applicable for the benefit of children of the testator.

Danckwerts for the plaintiffs.

Charles Harman K.C. and *Leonard Stone* for the testator's two daughters. The rule against double portions has always been applied to legacies, and subsequent advances to the same person adeem legacies pro tanto, for the benefit of the residuary legatees.

In *Montefiore* v. *Guedalla* (1) the rule was applied to shares of residue, but the decision only affected the shares taken by children. The fact that the ademption of a legacy swells the residue in favour of a stranger does not, according to *Meinertzagen* v. *Walters* (2) prevent the application of the rule. We submit, however, that having regard to the authorities, the fact that the residue is undisposed of, and there is a partial intestacy, prevents the rule from applying at all.

There being no valid residuary bequest, the testator's widow and son take shares in the estate against the will, and have no right to ask for any application of the rule against double portions. Having regard to the intestacy as to the residue, it is impossible to say in what proportions the testator intended his children ultimately to take. The rule is only a rule of thumb, by which the Court ascertains or endeavours to carry out the testator's intentions, and those intentions are defeated by the intestacy which has resulted.

The only result of requiring a beneficiary to bring a share into hotchpot, would be to increase the extent of the intestacy.

In *In re Heather* (3) Swinfen Eady J. said that the rule had never been applied so as to benefit a stranger against a child of the testator.

The rule does not apply at all to a partial intestacy: *In re Roby.* (4) The sons and daughters were all similarly advanced, and such advances have not to be brought into hotchpot: *In re Scott.* (5)

Norman Daynes K.C. and *E. M. Winterbotham* for the testator's widow, who was also the administratrix of a deceased son. The present case is not exactly the same as that of bringing advances into hotchpot; the rule against double portions applies differently: see *Ex parte Pye.* (6) There is no question of any one having a special equity. Where a portion has been

(1) (1859) 1 De G. F. & J. 93.
(2) (1872) L. R. 7 Ch. 670.
(3) [1906] 2 Ch. 230.
(4) [1908] 1 Ch. 71.
(5) [1903] 1 Ch. 1.
(6) (1811) 18 Ves. 140; 2 Wh. & T. L. C. 370.

given, the Court attributes to the testator, by presumption, an intention that the settlement shall operate by way of ademption of a legacy. Any person entitled to the benefit of the rule can enforce it.

There is no authority which exactly covers the present point; if the earlier cases had set out what happened to the residue, we should have such authority. We rely on the dicta in *Meinertzagen* v. *Walters* (1) where it was said by both of the Lords Justices that the presumption of ademption does not depend upon the question whether any residuary legatee and, if so, which benefits by it. The effect of the Administration of Estates Act, 1925, s. 49, is, if anything, in favour of this contention.

The principle does not depend upon any rule of equality among children. If a legacy is given for a certain purpose and the gift is afterwards made by the testator in his lifetime for the same purpose, the legacy is adeemed: *In re Pollock.* (2) There is a presumption that the gift is intended to be in fulfilment of some moral obligation, and the legacy is adeemed by the gift because the law presumes that the testator did not intend to duplicate his gifts.

No share of residue is adeemed, only the legacy, and whoever is entitled to the residue necessarily benefits by any increase of it due to the application of the rule.

In re Heather (3) is a case where it does not appear exactly what the learned judge decided, but it does not apply to the present case, as the question of ademption did not really arise. The whole of the reasoned part of the judgment deals with a share of residue and not a legacy.

Harold Christie K.C. and *J. G. Strangman* for the testator's surviving son, adopted the same argument. Here the principle of ademption does apply. It makes no difference whether the residue passes under a will, or as upon an intestacy: *Cooper* v. *Macdonald* (4); *Stewart* v. *Stewart.* (5)

Cur. adv. vult.

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(1) L. R. 7 Ch. 670, 673, 674.
(2) (1885) 28 Ch. D. 552.
(3) [1906] 2 Ch. 230.
(4) (1873) L. R. 16 Eq. 258.
(5) (1880) 15 Ch. D. 539.

March 16. SIMONDS J. I have already decided several points on the construction and effect of this will, but I must restate a few facts and some parts of the will in order to make my judgment intelligible on the point which I reserved for further consideration.

The testator, Ernest Vaux, made his will on November 27, 1919, and thereby provided that after the death or re-marriage of his wife, but in the latter case subject to an annuity of 500*l.* in her favour, his trustees should stand possessed of his residuary trust fund on trust to set aside and appropriate for each of his daughters who should be living at his death or be born in due course thereafter investments which should, at the date of such appropriation, be of the value of 20,000*l.* He directed that the sum so appropriated should be held on the usual trusts for his daughters and their children and declared that the rest, residue and remainder of his residuary trust fund should be held on certain trusts for the benefit of his children and their issue. I have already decided that this ultimate trust infringes the rule against perpetuity and is void and of no effect.

The testator died on November 25, 1925. He had two sons and two daughters, all of whom survived him. His wife also survived him and has not re-married. Between the date of his will and his death—namely, on December 9, 1924—he made a settlement of 8000 6 per cent. preference shares of 5*l.* each in C. Vaux & Sons, Ld., on his four children in equal shares, so that each daughter had settled on her and her children 2000 of such shares. No question has been raised in these proceedings as to the provision thus made for the sons, but as to the daughters the question has been raised whether the provision so made for them was a " portion " so as to make the rule against double portions applicable, if it was otherwise applicable, to (*a*) the legacy of 20,000*l.* bequeathed by the will and (*b*) the provision thus made inter vivos. This question I have already decided in the affirmative, holding that the settlement of shares in this company is equivalent to the provision of a sum of money of the value of such shares. It is now necessary to consider more closely whether and how far the rule applies in this case, and I need only add to the statement of facts which I have already made this further result of my decision on the construction and effect of the residuary bequest—namely, that the executors must hold the ultimate residue of the trust fund on trust for the persons entitled under the Statute of Distributions in the shares in which they are entitled thereunder.

It has been argued before me on the one hand that the rule is not to be applied where there has been, as here, a partial intestacy, or at any rate that it ought not to be applied for the benefit of the widow of the testator, and on the other hand that it is to be applied and, moreover, if applied, must be applied for the benefit of all persons who take a share of the undisposed of residue, whether widow or child.

In the course of the argument I was referred to a number of authorities, and I have since looked at a larger number. In the result I am satisfied that there is nothing which precludes me from deciding, and that I ought on principle to decide, first, that the rule must here be applied; and, secondly, that it can and must be so applied as to benefit children only and not the widow who, for this purpose, is to be regarded as a stranger to the testator.

The contention that to such a case as this, that is, a case of partial intestacy, where, by a fiction the executors hold the undisposed of residue on trust for the persons entitled under the statute, the rule against double portions can have no application, was largely founded on the analogy of the Statute of Distributions itself. It being the law until the coming into force of the Administration of Estates Act, 1925, that in the case of partial intestacy advances made by the testator in his lifetime need not be brought into hotchpot (see *In re Roby* (1)), why, it was urged, should the rule against double portions be applied in a similar case? It appears to me that the answer to this contention is to be found in the history of the rule against double portions as applied to cases of ademption of legacies. The rule against double portions has several aspects. With one of them I had occasion recently to deal in *In re Leek's Settlement Trusts.* (1) In its application to cases of ademption, which is perhaps the most frequent sort of application, the principle is clear. It is supposedly the duty of a father to make provision for his child. If, having performed that duty by his will, he subsequently makes provision for his child inter vivos, he is presumed to have done in whole or in part that which he intended by his will to do, and is presumed to intend that his will should not operate in part or in whole with regard to the provision thereby made. Just as when a testator by his will gives his horse, Brown Bess, to A.B., and then gives it to him in his lifetime, the legacy is adeemed; or when by his will he gives to A.B. the sum of 100*l.* for a particular purpose and then gives him the same sum in his lifetime for the same purpose, the legacy is adeemed; so, by an artificial rule, if a testator by his will gives a portion to a child, and then gives a portion to that child in his lifetime, the will portion is in whole or in part adeemed, because he is presumed in each case to be making the gift in discharge of the same natural obligation. This being the rule of ademption, it cannot, in my judgment, be material whether the testator makes any valid disposition of his residuary estate or what disposition he makes, for the legacy is adeemed once and for all. It will not be revived even by a subsequent codicil re-publishing the will: see *Powys* v. *Mansfield.* (2) I must come to the conclusion, therefore, that the rule against double portions is applicable to a case of partial intestacy.

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(1) [1908] 1 Ch. 71.

Next comes the question how it is to be applied where the persons entitled to the undisposed of residue are (*a*) children and (*b*) the widow of the testator. On this part of the case I am conscious that my decision runs counter to dicta of very eminent judges. It appears to me, however, that I am justified, both on principle and by direct authority. In stating the rule against double portions in its application to ademption of legacies it has been sufficient to refer only to one aspect of it—namely, the purpose or obligation of the parent to make provision for a child. There is, however, another aspect of it which is equally important in considering when and how far it is to be applied, because the equitable doctrine of double portions, whether with regard to ademption or in its other aspects, is founded not only on the duty of a father to provide for his children, but also on his presumed intention to provide equally for them unless he plainly expresses himself to the contrary. Thus in *In re Lacon* (1) Bowen L.J., after citing the well-known judgment of Lord Cottenham in *Pym* v. *Lockyer* (2), and examining the presumption on which the doctrine rests, thus finally describes it: "a presumption, it "is said, which ought to be made in favour of equality among "children, it being the view of the law that equality is what "the father, in dealing with his children, would, in most cases, "presumably intend." Though in few cases is this aspect of the case emphasized, yet in no case have I been able to find the rule applied except where there were other persons than the child advanced to whom the testator stood in the natural relation of father or in loco parentis.

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(1) [1937] Ch. 600.

(2) (1837) 3 My. & Cr. 359, 376.

If, then, the very foundations of the rule and the conditions of its application are that there are two or more persons with regard to whom the testator is presumed to intend equality of treatment, it would surely be strange if the rule was in fact so applied for the benefit of persons with regard to whom no such intention could be ascribed to the testator.

It is curious that the first decided case in which this view —which I should venture to think is clear enough from a consideration of the doctrine—was definitely stated was not until 1872, when *Meinertzagen* v. *Walters* (3) was decided by James and Mellish L.JJ. In that case a testator directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life and to divide the other moiety equally between his children. After his will he made advances which were deemed to be portions to some of his children. Such advances accordingly had to be brought into account for the benefit of the children, among themselves, but it was decided that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue. The contrary contention was described by James L.J. as so shocking to his common sense and to his sense of justice that he was glad to find that there was no foundation in the authorities for holding that the law of England was subject to that opprobrium to which, if the law were as alleged, it would be justly subject in the eyes of the civilized world. The case before the Court was, however, as I have already stated, one in which the contest arose with regard to residue only, and James L.J. in the course of his judgment, used language on which so much reliance has been placed in the present case. He said (1): "No doubt that"—that is, the doctrine—"has been necessarily "applied to the advantage of residuary legatees, because, "where the legacy fails, or is satisfied, or is adeemed, from "the very nature of the case the residuary legatee who takes "his chance gets the benefit of that, as he would the burden "of any diminution. That is the state of the law with regard "to legacies." So also Mellish L.J. said (2): "Now, in "the ordinary case of a legacy, where a legacy has been "left to a child, and then a gift has been made which amounts "to an ademption of that legacy, there certainly appears to "be no possible way of holding it to be an ademption so as "to carry out the general rule against double portions, except "by holding that whoever has the residue benefits by it; "because by the necessity of the case the persons who have "the residue must benefit by the fact of the previous legacy "not being paid from any cause whatever." It is with the greatest diffidence that I, in the face of those statements, decide that where the rule has to be applied on the ademption of a legacy it neither need, nor ought to be applied for the benefit of a residuary legatee who is a stranger to the testator.

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(1) [1891] 2 Ch. 482, 497.
(2) (1840) 5 My. & Cr. 29, 46.
(3) L. R. 7 Ch. 670, 673, 674.

In the first place the principle must be the same in both cases. It is equally shocking to common sense and the sense of justice that a stranger should benefit by the application of the rule, whether on the ademption of a legacy or on a simple division of residue. In the second place, the authorities

(1) L. R. 7 Ch. 673.

(2) Ibid. 674.

cited to the Court in that case do not justify the proposition that "that is the state of the law with regard to legacies," if it is meant that they decide that a stranger residuary legatee may benefit by an application of the rule, because in none of them, it appears to me, was there a stranger residuary legatee. With respect, I doubt whether the proposition could be put higher than that it was assumed to be the law, though there had never been an express decision. In the third place I fail to see the necessity which appears to have weighed with both the Lords Justices. There is surely no necessity arising from the nature of the case why, on the ademption of a legacy, all the residuary legatees alike should benefit. Let me take a simple example. A testator has two sons, A and B, and a nephew C, to whom he does not stand in loco parentis. He makes a will by which he gives a legacy of 3000*l.* to son A, and his residue equally between A, B and C. He then gives 3000*l.* to A in his lifetime, and I will assume that both legacy and gift inter vivos were portions so as to bring the rule into play. He dies, leaving a clear sum of 15,000*l.* available for distribution. For the benefit of C the rule is not applied; he therefore gets one-third of the residue of 12,000*l.*, or 4000*l.* But as between A and B it is applied for the benefit of the latter, and accordingly of the remaining 11,000*l.* A gets 5500*l.* and B gets 5500*l.* The testator is presumed to have intended equality between his children except so far as he has made express provision to the contrary. In the example given his intention is presumed to have been that A should get, in all, 3000*l.* more than B, and that intention has been carried out. Calculations of some difficulty may, in some cases, have to be made, but I see no reason why the principle should not in all cases be applied just as it must be applied in cases such as *Meinertzagen* v. *Walters* (1), where the question arises only in respect of a residuary gift, or in analogous cases such as *Stewart* v. *Stewart* (2), where the question arises from a hotchpot direction and a partial intestacy.

The observations of the Lords Justices to which I have referred were not necessary to the decision of the case, and I am the less reluctant to differ from them when I recall how the doctrine of the rule against double portions has developed in this Court. Lord Hardwicke L.C. held, and it was for many decades the law, that a portion by will would be wholly adeemed by a lesser portion inter vivos. That ceased to be the law. It was for long thought that the rule against double portions could have no application to a share of residue until, in 1859, the contrary was laid down. It was only in *Meinertzagen* v. *Walters* (1), decided in 1872, that the Court clearly laid down that the rule was not, in the case of a division of residue, to be applied for the benefit of a stranger. It appears to me that in this process of development the next logical step is to determine that in the case also of ademption of a legacy the rule is not to be used to benefit a stranger.

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(1) L. R. 7 Ch. 670, 673, 674.

(2) (1880) 15 Ch. D. 539.

Finally, in support of this view, I must refer to the decision of Swinfen Eady J. in *In re Heather*. (2) In that case a testator bequeathed a legacy of 3000*l*. to an adopted child to whom he stood in loco parentis, and divided his residue equally between that child and a stranger. He made a subsequent advance of 1000*l*. to the child. The learned judge held that the advance was not a portion, so that the question of double portions did not arise at all, but he went on to say that, even if it was, a rule designed to produce equality among children ought not to be extended so as to reduce their shares for the benefit of a stranger. " No authority compels "me to do so," he said, " and I should certainly have declined "to extend the rule in this way if the 1000*l*. had been a portion."

It has been urged that the observations of Swinfen Eady J. were dicta only, since on his own finding the question did not arise, and, further, that though he cited and relied on *Meinertzagen* v. *Walters* (1), he did not refer to the material passages which I have quoted. That is so, but what Swinfen Eady J. would have done if it had been necessary I have little hesitation in doing where the necessity arises.

There will, accordingly, be a declaration that, for the purpose of ascertaining the ultimate residue of the testator's estate, and the shares therein of his children, but not for

(1) L. R. 7 Ch. 670, 673, 674.

(2) [1906] 2 Ch. 230, 232, 234.

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the purpose of ascertaining the ultimate residue of the estate, and the share therein of his widow, the daughters' legacies are to be treated as adeemed to the extent of the value on December 9, 1924, of the shares settled on them respectively.

Solicitors: *Patersons, Snow & Co., for Ranson & Co., Sunderland.*

H. L. L.

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J.
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April 1.

In re TURNER.

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[1937. T. 2108.]

Will—Legacy of shares in company—Debt owing by testator to company—Company entitled to lien on shares for debt—" Interest in property " . . . . charged with the payment of money "—Equitable charge—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 35.

Under s. 35 of the Administration of Estates Act, 1925, where a person at the time of his death is entitled to property which is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise, and the deceased has not by his will expressed any contrary intention, the interest in property so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge.

A testator by his will bequeathed 10,000 shares in a private company, in which he held the bulk of the capital, to his widow. Under the articles of association the company had a first and paramount lien upon all shares registered in the name of a member for his debts, liabilities, and engagements. At the date of his death the testator owed a large sum of money to the company, subsequently paid off by his executors :—

Held, that the article in question created an equitable charge on the shares bequeathed to the testator's widow, and that she took the shares subject to the obligation to discharge a proportionate amount of the moneys owing to the company by the testator at the time of his death.

SUMMONS.

The testator, Arthur Turner, who as principal shareholder held 173,030 shares in Luke Turner & Co., Ld., a private company, by his will dated December 30, 1925, bequeathed 10,000 fully paid ordinary shares of 1*l.* each in the company to his wife, Gladys Marie Turner, and appointed the plaintiffs and his wife executors thereof. The testator died on April 26, 1928, and his will was duly proved on July 19, 1928.

At the date of his death the testator owed the sum of 24,424*l.* to the company. Since then this debt had been repaid by the executors, who raised the money by sale of shares. The company's articles of association provided as follows :—

Article 10: "(*j*) The company shall have a first and "paramount lien upon all shares registered in the name of "each member (whether solely or jointly with others) and "upon the proceeds of sale thereof for his debts, liabilities "and engagements solely or jointly with any other person "to or with the company whether the period for the payment "fulfilment or discharge thereof shall have actually arrived "or not and no equitable interest in any share shall be created "except upon the footing that Article 6 hereof is to have full "effect."

Article 6: "Save as herein otherwise provided the company "shall be entitled to treat the registered holder of any share "as the absolute owner thereof and accordingly shall not "except as ordered by a court of competent jurisdiction "or as by statute required be bound to recognize any "mortgage or charge thereof or any trust or equity in "relation thereto or any equitable or other claim to or "interest in such share on the part of any other person."

Article 10: " (*k*) Any such lien shall extend to all dividends "from time to time declared in respect of the shares subject "thereto.

"(*l*) Unless otherwise agreed the registration of a transfer "of shares shall operate as a waiver of the company's lien "(if any) on such shares.

"(*m*) For the purpose of enforcing such lien the directors "may sell the shares subject thereto in such manner as they "think fit but no sale shall be made until such period as "aforesaid shall have arrived and until notice in writing of "the intention to sell shall have been served on such member "his executors or administrators and default shall have been "made by him or them in payment fulfilment or discharge "of such debts, liabilities or engagements for seven days after "such notice.

"(*n*) The net proceeds of any such sale shall be applied "in or towards satisfaction of such debts, liabilities or engagements and the residue (if any) paid to such member his "executors, administrators or assigns."

The summons was taken out by the plaintiffs to have it

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determined whether as between the defendant Mrs. G. M. Turner and the residuary legatees the 10,000 ordinary shares of 1*l.* each in the capital of Luke Turner & Co., Ld., bequeathed to Mrs. Turner were liable to bear a proportionate part, with the other shares in the company registered in the name of the testator, of the debt owed to the company by the testator at the date of his death, and if so whether Mrs. Turner ought to be debited with interest thereon at 5 per cent. or any and what other rate and for what period.

L. M. Jopling for the plaintiff.

Leonard Stone for the testator's widow, Gladys Marie Turner. The language of s. 35 (1) expressly includes a particular kind of lien—namely, one for unpaid purchase-money, and therefore any other lien is impliedly excluded.

The section is only intended to apply to a case where a testator by his own act has created a mortgage or legal charge on the property, except the one case of a lien for unpaid purchase-money. This is a case of lien, and a lien has been defined as a legal right which a person has otherwise than by express contract. The operation of the section depends on the intention of the testator, and it is the essence of that intention that he should know the position.

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(1) Administration of Estates Act, 1925, s. 35: (1.) "Where a person dies possessed of, or entitled "to, or, under a general power of "appointment (including the statutory power to dispose of entailed "interests) by his will disposes of, "an interest in property, which at "the time of his death is charged "with the payment of money, "whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid "purchase-money) and the "deceased has not by will deed "or other document signified a "contrary or other intention, the "interest so charged shall, as "between the different persons "claiming through the deceased, "be primarily liable for the "payment of the charge; and "every part of the said interest, "according to its value, shall bear "a proportionate part of the "charge on the whole thereof.

"(2.) Such contrary or other "intention shall not be deemed "to be signified—

"(*a*) by a general direction for "the payment of debts or of all "the debts of the testator out of "his personal estate, or his "residuary real and personal estate; "or

"(*b*) by a charge of debts upon "any such estate; unless such "intention is further signified by "words expressly or by necessary "implication referring to all or "some part of the charge.

"(3.) Nothing in this section "affects the right of a person "entitled to the charge to obtain "payment or satisfaction thereof "either out of the other assets of "the deceased or otherwise."

A testator cannot signify a contrary intention within the section unless the charge is one created by his own act. The section was intended solely to extend Locke-King's Acts to personalty, and cannot be interpreted as including any kind of lien, other than the one expressly mentioned.

G. D. Johnston for Mrs. Lois Mary Gladys Godfrey, a daughter of the testator, and her infant child. The mere fact that the article describes this charge as a " lien " cannot affect the nature of the charge. An article such as art. 10 creates an equitable charge on the shares, and thus brings the case within the section: *In re General Exchange Bank* (1); *Everitt* v. *Automatic Weighing Machine Co., Ld.* (2): *In re National Bank of Wales, Ld.* (3); *Hopkinson* v. *Mortimer, Harley & Co., Ld.* (4)

A lien may be either an equitable charge as here, or a common law lien such as a banker's lien.

The testator signed the articles himself and was a governing director of the company. He therefore entered into a contract with the company to create this equitable charge, and the company could have sold his shares to obtain payment of the debt owing to them. [He referred to the Real Estate Charges Act, 1854, and the amending Acts of 1867 and 1877.]

SIMONDS J. In this case the testator, Arthur Turner, by clause 7 of his will bequeathed to his wife absolutely 10,000 fully paid ordinary shares of 1*l.* each in Luke Turner & Co., Ld., a company in which he held the bulk of the shares. At the time of his death his shares in Luke Turner & Co., Ld., were held by him subject to what was described in art. 10 (*j*) of the articles of association of the company as a first and paramount lien to secure a debt of 24,000*l.* then owing by him to the company. The question raised in these proceedings is whether those 10,000 shares so bequeathed to the legatee ought to bear a proper proportion of the charge on all the testator's shares.

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(1) (1871) L. R. 6 Ch. 818.

(2) [1892] 3 Ch. 506, 509.

(3) [1899] 2 Ch. 629, 675.

(4) [1917] 1 Ch. 646, 654.

The articles of association of the company provide as follows: [His Lordship read the articles set out above and proceeded:] I have read these clauses from the articles in order to see what the true position is, for it is an inadequate description of the relation between the parties to say that a lien is created. That being the position it is necessary next to see what was effected by s. 35 of the Administration of Estates Act, 1925. [His Lordship read the section.] This section of the Administration of Estates Act, 1925, was intended to apply to personal as well as to real estate the law previously applied only to real estate by the Real Estate Charges Act, 1854, commonly called Locke-King's Act, and the Acts of 1867 and 1877 which amended that Act.

The earliest Act, that of 1854, used the following words: ". . . . land or other hereditaments . . . . charged with the "payment of any sum or sums of money by way of mortgage." It was held that under those words a vendor's lien for unpaid purchase-money was not included. The Real Estate Charges Act, 1867, amended the law and provided that the word "mortgage" should include a lien for unpaid purchase-money. The law was again extended by the Real Estate Charges Act, 1877, which used the words "land or other "hereditaments of whatever tenure which shall . . . . be "charged with the payment of any sum or sums of money "by way of mortgage or any other equitable charge, including "any lien for unpaid purchase-money." Those words, slightly altered, have been incorporated in the Administration of Estates Act, 1925, with the addition of the words "or other-"wise" so as to read "charged with the payment of money "whether by way of legal mortgage, equitable charge or "otherwise (including a lien for unpaid purchase money)."

I have now to decide whether in this state of the law the shares, which under the articles of association of the company are subject to, what is therein described as a paramount lien, are subject to a charge under the Act. It is clear on

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the authorities that there is created by such provisions as are contained in these articles an equitable charge in favour of the company: see *In re General Exchange Bank* (1); *Everitt* v. *Automatic Weighing Machine Co.* (2). If that is so, it is unnecessary for me to decide whether any particular lien other than a lien for unpaid purchase-money comes within the words of the Act; nor have I to consider the effect of the words "or otherwise." It is sufficient to say that here there are shares which at the time of the testator's death were subject to an equitable charge in favour of the company. I must accordingly declare that the legatee is primarily liable as between herself and other persons interested in the estate of the testator to discharge a proportionate amount of the moneys owing to the company by the testator at the time of his death.

Solicitors: *Sanderson, Lee & Co.; Robinson & Bradley, for Harding & Barnett, Leicester.*

(1) L. R. 6 Ch. 818.
(2) [1892] 3 Ch. 506, 509.

H. L. L.

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MORTON J.

1938

March 3, 4, 7, 8, 9.

[1937. J. 257.]

Copyright—Football pool tables—Reproduction—Fair dealing—Criticism or review—Oblique motive—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 2, *sub-s.* 1, *para.* (*i*).

By s. 2, sub-s. 1, of the Copyright Act, 1911: "Copyright in a "work shall be deemed to be infringed by any person who, without "the consent of the owner of the copyright, does anything the "sole right to do which is by this Act conferred on the owner "of the copyright: Provided that the following acts shall not "constitute an infringement of copyright:—

"(i) Any fair dealing with any work for the purposes of private "study, research, criticism, review, or newspaper summary."

Anything coming within the proviso is not an infringement of copyright, even if, but for the proviso, it would be: but whether a reproduction is a "fair dealing" within the proviso depends, to some extent, on how much of the work is reproduced.

Hawkes & Son (London) Ld. v. *Paramount Film Service Ld.* [1934] Ch. 593, followed.

Omission of the author's name does not of itself necessarily prevent a reproduction and criticism of part of a work from being a "fair dealing" within the proviso.

WITNESS ACTION.

In this action, Mr. Ernest Leo Johnstone (hereinafter called "the plaintiff"), claimed damages for infringement of copyright in, and conversion of, tables for use in football competitions, the tables being comprised in two original literary works, of which he was the author.

The first of the two works, published in May, 1934, was called "A summary of some systems and tables in dealing "with three alternative possibilities or results applied to "crosswords, pictures and pools,"; and the second, published in 1935, was called "Systematic football betting."

The first defendants were the publishers, and the second defendant, Miss Kathleen May Beauchamp, trading as "The Farleigh Press," was the printer, of a paper called "The "Football Forecast."

In the issue of "The Football Forecast," for December 1, 1936, was published a letter headed "Those penny pool

" tables again," and purporting to be signed by " R. I. H. " (Birmingham)." It was held to have been established during the hearing of the case that a table appearing in that letter, and headed " Reduced permutation table," was, in substance, a reproduction of a table appearing in each of the plaintiff's two booklets, being Table 1, on p. 8 of " A " summary of some systems and tables," and Table 17, on p. 29, of " Systematic football betting."

This Table was a suggestion for enabling entrants for football pools to enter with prospects of good results. It was a " four-match " table: when four matches were played, there being three possible results to each match, there were eighty-one possible permutations of the results. Table 17 showed how to send in nine entries, so arranging them that at least one would be wrong in no more than one match and one of them might be wholly correct.

The writ in the action was issued on February 3, 1937.

The defendants raised three defences: first, that Table 17 was not a substantial part of " Systematic football betting," and that Table 1 was not a substantial part of " A summary " of some systems and tables," within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911; secondly, that the table complained of was not copied, but was an independent compilation; and thirdly, that what was done in the case of the issue of " The Football Forecast," for December 1, 1936, was a " fair dealing " with the plaintiff's work for the purposes of criticism or review within the proviso to s. 2, sub-s. 1, of the Copyright Act, 1911. They contended also that the plaintiff had suffered and would suffer no damage by reason of the act complained of.

The case is reported only on the third point.

Rudolph Moritz K.C. and *G. H. Lloyd Jacob* for the plaintiff. The defendants have taken Table 17 in " Systematic football " betting." They say, first, that they did not copy it, but obtained it by independent compilation. It is submitted that that is wildly improbable: the odds are a hundred thousand to one against it. Secondly, they say that it is not a substantial part of the book. The answer to that is that it is the kernel of the whole book.

H. C. Leon and *C. H. C. Haslam* for the defendants.

The cases on " fair user," although they may be of some assistance, are not of authority since the coming into force of the Copyright Act, 1911. There is something else to be dealt with—namely, " fair dealing " : and there is at present no authority on the meaning of the words " fair dealing." In so far as the other cases suggest that the user made here is " fair user," the defendants have an a fortiori case. The phrase " fair dealing " shows that " dealing " is prima facie " fair " unless the animus furandi is present : that is to say that, if a deliberate intention to steal can be proved, it is probably not a fair dealing. In the present case the defendants must succeed, because their intention must have been to criticize. That contention involves, to some extent, a consideration of R. I. H.'s letter.

The principle of fair dealing in copyright cases is the same as that of fair comment in libel actions. If that were not so, every author would be entitled to say that he does not want his work to be reproduced. If the reproduction was done with an improper motive it would of course be actionable.

The real part of " Systematic football betting," the part which sells it, is the written matter. The tables in the book are themselves not of much use.

With the qualification that the law on the subject is now new, the older cases are not without value. In *Cescinsky* v. *George Routledge & Sons, Ld.* (1) Rowlatt J. held that there had been an infringement.

In the proviso to s. 2, sub-s. 1, of the Copyright Act, 1911, the word " criticism " means criticism of a work as such : thus, in the present case, the " criticism " is criticism of the tables as such, i.e., of the work or of a substantial part of the work : *British Oxygen Co.* v. *Liquid Air, Ld.* (2)

Smith v. *Chatto* (3) is a useful case because it refers to and deals with a number of the earlier authorities. In *Dodsley* v.

(1) [1916] 2 K. B. 325 ; Macgilliv ray's 1911–16 Copyright Cases, 308.

(2) [1925] Ch. 383.

(3) (1874) 31 L. T. 775.

Kinnersley (1) Sir Thomas Clarke M.R. laid emphasis on the fact that the work had been previously published in a similar form by the plaintiff in another paper. That was a case of an abridgement. [They referred to *Cary* v. *Kearsley*. (2)]

Applying, in the present case, the test whether the table was taken with the deliberate intention of stealing the copyright or in order to accomplish some useful purpose, there is, even on the old cases, no infringement: *Whittingham* v. *Wooler*. (3)

Neither within these cases nor within s. 2 of the Copyright Act, 1911, are the defendants in the present case guilty of infringement.

There are subsidiary points, but the real defence is that of "fair dealing" On that point it is relevant to observe that it is possible for persons other than the plaintiff to work out these tables. They are valueless without the reading matter that goes with them. That is why the defendants have not taken a "substantial part" of the plaintiff's work. The defendants have put in quite other reading matter.

Moritz K.C. and *G. H. Lloyd Jacob* in reply, referred to *Elderton* v. *United Kingdom Totalizator Co., Ld.* (4)

The proviso to s. 2, sub-s. 1 is new, and in construing it little help is to be derived from the older cases. Those cases did, however, deal with "fair user," and it was necessary to consider whether the animus furandi was present. Those cases thus show that it is necessary now also to inquire whether there is the animus furandi. It is notorious that the Copyright Act, 1911, was an attempt to codify the law: and it would be strange if the Legislature consented to accept from the draftsman the word "fair" with a different meaning from that which it had in the cases decided before 1911. Further, the phrase "fair dealing" cannot be so restricted as to exclude only the animus furandi. It must be extended so as to exclude also any oblique motive or improper action.

A criticism is a judgment passed by some expert person on a literary work: and in fact that person need not necessarily

(1) (1761) 1 Amb. 403.
(2) (1803) 4 Esp. 168, 170.
(3) (1817) 2 Swanst. 428.
(4) (1935) 152 L. T. 549.

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be an expert. There must be first a work and then a judgment: but the work must be a specific work, and the judgment, if it is to be a criticism, must purport to be a judgment of a specific work. In the present case, the article was not purporting to criticize the plaintiff or his work.

With regard to criticism it is necessary on the authorities, to deal with motive. The animus furandi must involve an improper motive, and where there is an improper motive the dealing ceases to be fair. The work must be criticized specifically. It is not enough that, in the present case, what was criticized happened fortuitously to be the plaintiff's work.

MORTON J. [after stating some of the facts:] I pause here to say that in my view the proviso to s. 2, sub-s. 1, of the Copyright Act, 1911, affords an additional protection to the defendants in copyright actions in the case of the acts specified in that proviso. Even if a defendant's act would have been an infringement apart from the proviso, he is protected, in my view, by the proviso, if his conduct comes within the terms of the proviso. To give an instance: if a defendant publishes a substantial part of the plaintiff's work, but the publication is a fair dealing with the work "for the purposes of private "study, research, criticism, review, or newspaper summary," the defendant is protected by the proviso. I think that this was the view taken by the Court of Appeal in *Hawkes & Son (London) Ld.* v. *Paramount Film Service, Ld.* (1). In that case the Court took the view that the defendants had reproduced a substantial part of the plaintiffs' work, but went on to consider whether the proviso applied. It seems to me that this consideration would have been unnecessary if the mere fact that a substantial part had been taken rendered it impossible to bring the proviso into operation. I may add, however, that the substantiality of the part reproduced is, in my view, an element which the Court will take into consideration in arriving at a conclusion whether what has been done is a fair dealing or not. To take an example, if a defendant published long and important extracts

(1) [1934] Ch. 593.

from a plaintiff's work and added to those extracts some brief criticisms upon them, I think the Court would be very ready to arrive at the conclusion that that was not a fair dealing within the section. No doubt there are many cases near the border-line, and the line may not be easy to draw in the particular case, nor have I found it at all easy to draw in the case now before me.

In order to render the facts of this case intelligible I must embark on a brief description of what are known as "football "pools." There are four separate leagues in English football, the First Division, the Second Division and two Third Divisions, and there are twenty two teams in each league. It is thus possible to have forty-four matches of interest to the public on a Saturday in England. There are also two Scottish leagues, which also are brought into the pools from time to time. The promoters of the pools issue documents in tabular form inviting the public to enter for a large variety of pools. For the sake of simplicity I shall take one example, a twelve-match sixpence pool. I am not sure if that is the description ordinarily applied, but I shall go on to explain what I mean by that. In such a case the promoters name twelve matches which are to be played on a particular Saturday. They invite any member of the public to send in an entry or entries forecasting the result of all these twelve matches and enclosing sixpence with each entry. Perhaps I ought not to say "enclosing "sixpence," but at any rate the entrant has to supply in some form or another to the promoters sixpence for each entry. When the matches have been played, the pool made up of these sixpences, after deduction of percentages for the promoters, and possibly for expenses, is divided amongst the entrants who most nearly forecast the results. I understand large sums are invested, if "invested" be the right word, weekly by the public in these pools.

Table 17 was, I am satisfied, the result of very careful study of the subject by the plaintiff and the view that I take on the evidence is that it was an original and important part of the plaintiff's book. I think it would have been a matter of great difficulty for any one else to produce a table possessing the same advantages as Table 17 if he had started off with his own unaided efforts trying to produce such a table. I am satisfied that the production of the table involved a great deal of research, care and originality on the part of the plaintiff.

I now come to the history of the events leading up to the action. [His Lordship stated the rest of the facts, and continued :] The reduced permutation table in R. I. H.'s letter is undoubtedly a reproduction in substance of Table 17 in "Systematic football betting." I have now to consider, first, whether that letter amounted to a publication by the defendants of a substantial part of the plaintiff's booklets or either of them. In my view it did. I am satisfied upon the evidence that Table 17, although small in bulk, was an important table for the purpose of "Systematic football betting." It is also incorporated in certain other tables in the booklet, which I need not enumerate. As I have said, I think it was an original idea and I think considerable importance is attached, and rightly attached, to it by the plaintiff for the purpose of his booklet. If it was, as I think, a substantial part of "Systematic football betting" a fortiori it was a substantial part of "A summary of some systems and tables." I base my view under this heading on a consideration of the evidence as a whole, which I do not propose to review in detail, coupled with the history of the case as revealed in the correspondence. Of course, it is clear that the word "substantial" does not only denote bulk or length of extracts. Lord Cottenham in *Bramwell* v. *Halcomb* (1) said : "When it comes to a question of quantity "it must be very vague. One writer might take all the vital "part of another's book, though it might be but a small "proportion of the book in quantity. It is not only quantity, "but value that is always looked to. It is useless to refer to "any particular cases as to quantity." Although Table 17 is a small part of the plaintiff's booklet, even taking into account the fact that it appears in several places, I do regard it as being a part of value for the purpose for which the booklet was written.

The second question is whether the reduced permutation

(1) (1836) 3 My. & Cr. 737, 738.

table in R. I. H.'s letter is a copy of the plaintiff's work or is the result of independent research or labour by R. I. H. I have already stated my views as to that in dealing with the facts, and I am quite clearly of opinion that the former is the correct view.

I now come to the question which has given me by far the greatest difficulty in this case, namely, whether what has been done by the defendants is a fair dealing with the work for the purposes of criticism or review. I think in his opening speech counsel for the defendants relied both on the word "criticism" and on the word "review," but in his closing speech I think he rested his case principally, if not entirely, upon the word "criticism." First of all, I propose to consider whether R. I. H.'s letter, quite irrespective of the circumstances of its publication, was in itself a fair dealing for the purposes of criticism within the proviso to s. 2 of the Copyright Act, 1911. Counsel for the plaintiff has argued that an article cannot be a fair dealing with any work for the purposes of criticism unless the work is attributed to its author. I am unable to accede to that argument. I think, if part of a work is reproduced and criticisms are offered upon that part, it is not necessary, in order to bring the case within the proviso, that the name of the author should be referred to. I cannot find any such limitation in the words of the section, and I do not see any reason why I should import it. I think, if part of the work is set out and is criticized, that is enough to bring the matter within the words of the section so far as the purposes of criticism are concerned. Then, of course, one has to consider the question whether this is a fair dealing for the purposes of criticism. Again, taking R. I. H.'s letter and for the moment regarding it from the standpoint of the letter taken by itself, apart from the circumstances of its publication, I think that it was a fair dealing with the work as far as R. I. H. was concerned. I think that R. I. H. honestly desired to offer certain observations by way of comparison and criticism of the two tables which he set out in his letter.

But was the publication of this letter fair dealing on the part of the defendants? On this part of the case I have felt

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much doubt. I think there is much force in the contention of counsel for the plaintiff that any oblique motive, as he expressed it, would render the publication of the letter in question an unfair dealing, but it is unnecessary for me to express an opinion upon the correctness or incorrectness of this contention, because I am not satisfied upon the evidence that there was an oblique motive. I do not think that I should be justified, on the evidence before me, in forming the view that the motive in publishing this letter was what counsel for the plaintiff has called an oblique motive, for instance the motive of damaging the plaintiff or of taking an unfair advantage of his work.

The result is that the defendants succeed on their defence of fair dealing and that being so, the question of damages does not arise. The action must, therefore, be dismissed.

Solicitors: *Messrs. Judge, Hackman & Judge; Messrs. Rubinstein, Nash & Co.*

K. R. A. H.

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COLERIDGE-TAYLOR AND OTHERS *v.* NOVELLO AND COMPANY, LIMITED.

[1937. C. 2842.]

Copyright—Assignment—" Passing " and " commencement " of Copyright Act, 1911*—Period of assignment limited by Act—Later section of Act apparently nullifying limit—Later section a transitional provision applying to transition from copyright under earlier Acts to copyright under Copyright Act,* 1911*—Particular enactment presumed not to be intended to be altered by later general enactment—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 5, *sub-s.* 2 ; *s.* 24, *sub-ss.* 1, 3.

Under s. 5, sub-s. 2, of the Copyright Act, 1911, an owner of copyright may assign it or grant any interest in it by writing signed by himself or his agent. Under the proviso to the sub-section, such an assignment or grant " after the passing of this " Act " by an author who is the first owner of the copyright shall not (unless it be by will) vest in the assignee or grantee rights with respect to the copyright for more than twenty-five years from the author's death, the reversionary interest therein, despite any agreement by the author purporting to dispose of it, then devolving on his personal representatives.

Under s. 24, sub-s. 1, those entitled " immediately before the " commencement of this Act " to any right, or interest in a right, specified in the first column of the First Schedule to the Act shall thenceforth be entitled only to the substituted right or interest set forth in the second column, which shall subsist for the term for which it would have subsisted had the Act been in force when the work was made and the work entitled to copyright under the Act. Under the proviso to the sub-section, if the author of a work in which a right specified in the first column subsists " at the commencement of this Act " has previously assigned the right or granted an interest in it for its whole term, the substituted right created by the section shall, if there is no express agreement, pass to him at the date when the right would have expired had the Act not been passed, and any interest in the right " created before the commencement of this Act and then " subsisting shall determine " : but any one being an owner of the right or interest immediately before the date at which the right would so have expired may, at his option, either have an assignment of the right or a grant of a like interest in it subject as in the proviso mentioned, or, also subject as in the proviso mentioned, continue to reproduce or perform the work.

By sub-s. 3 : " Subject to the provisions of section nineteen " subsections (7.) and (8.) and of section thirty-three of this Act, " copyright shall not subsist in any work made before the com- " mencement of this Act, otherwise than under, and in accordance " with, the provisions of this section."

Under s. 37 the Act came into operation, in the United Kingdom, on July 1, 1912 :—

Held, (1.) that the word " passing " in the phrase " after the "passing of this Act" in the proviso to s. 5, sub-s. 2, means, not the date at which the Act came into operation (which is the meaning of "commencement") but the date of the Royal Assent to the Act in the form of a bill, after it had passed the Legislature.

Ex parte Rashleigh. In re Dalzell (1875) 2 Ch. D. 9, and *Rex* v. *Smith* [1910] 1 K. B. 17, followed.

(2.) That s. 24, sub-s. 3, deals with the transition from copyright under earlier Acts to that under the Copyright Act, 1911, and is not to be construed as taking away, so far as they relate to assignments of copyright under earlier Acts made after the passing, but before the commencement, of the Copyright Act, 1911, the rights given by the proviso to s. 5, sub-s. 2, which is a particular enactment containing a special provision and is therefore prima facie to be presumed not to be intended to be altered by s. 24, which is a subsequent general enactment.

Pretty v. *Solly* (1859) 26 Beav. 606, followed.

WITNESS ACTION.

In this action, the plaintiffs, Mrs. Jessie Sarah Fleetwood Coleridge-Taylor (hereinafter called "the widow"), the widow of Mr. Samuel Coleridge-Taylor (hereinafter called "the composer"), Mrs. Gwendolen Dashwood, the composer's daughter, and Mr. Hiawatha Bryan Coleridge-Taylor, his son, claimed a declaration that they were entitled to the copyright in "A Tale of Old Japan" by the composer, as from twenty-five years from his death on September 1, 1912, free from any right or interest of the defendants, Novello & Co., Ld. (hereinafter called "the company"), and an injunction to restrain the company, its servants and agents, from infringing that copyright by reproducing or performing, or authorizing the reproduction or performance, in public, of "A Tale of Old Japan" after September 1, 1937.

On March 11, 1912, the composer, who was the first owner of the copyright in "A Tale of Old Japan," executed a document headed "memorandum of agreement" whereby it was agreed that in consideration of the sum of threepence three farthings for every copy to be published and sold by the company, to be paid by the company to him so long as the copyright should last, for the absolute purchase of the copyright and right of publication, representation and performance, and all other the rights, property and interests intended to be thereby assigned, the composer, as beneficial owner, thereby assigned to the company all his copyright and right of publication, representation and performance of and in "A Tale of Old "Japan," including the title thereof, for the United Kingdom of Great Britain and Ireland, including the Channel Islands, and its colonies and dependencies, and for all foreign countries, and all other the property, rights and interests whether at law or in equity of the composer therein or thereto to hold the same unto the company for its absolute property; and the company thereby agreed with the composer that it would cause to be entered in proper books to be kept by it a true account of all copies of "A Tale of Old Japan" sold by it, and would allow that account to be inspected at all reasonable times by the composer and would pay or cause to be paid to the composer the aforesaid sum of threepence three farthings for each copy (except as therein mentioned) on or about the first day of February in each year so long as the copyright should last.

On October 16, 1912, letters of administration of the composer's estate were granted to the widow. On March 17, 1930, she assigned to all three of the plaintiffs the copyright of and in the composer's published and unpublished works and all performing and mechanical rights and all other rights in respect of the same so far as then vested in her as legal personal representative, together with all future rights in respect of any of the foregoing that might arise either under existing statutes or by law relating to copyrights or under any further statutes, and together with all manuscripts, subject nevertheless to and with the benefit of such contracts, licences and agreements as had been entered into by the composer or by her as his legal personal representative, to hold unto her and the daughter and son as tenants in common in equal shares absolutely.

The Copyright Act, 1911, was passed on December 16, 1911, but under s. 37 it came into operation in the United Kingdom on July 1, 1912. There was thus, in the case of the United Kingdom, a gap of some months between the passing of the Act and its coming into operation.

In September, 1910, there had been correspondence between the composer and the company or some person or persons on its behalf, about his assigning to the company the copyright in " A Tale of Old Japan." The first letter, dated September 2, 1910, from the composer to a Mr. Clayton, an official of the company, was : " Dear Mr. Clayton, I have "a new (short) work for quartet chorus and orchestra called "' A Tale of Old Japan,' the poem by Alfred Noyes, whose "new fairy play is to be produced at His Majesty's at Xmas, "and for which I am also writing the music. . . . . I think "you'll find the subject very fresh and I hope you'll like the "music. Sainton is anxious to do the thing at Brighton with "his festival chorus this coming season. I should of course "like the usual royalty if Messrs. Novello's agree to accept "the work, but as a special favour, I wonder if they would "consent to paying me twenty-five pounds down (instead of "ten) on account of future royalties, this because it has taken "me a long time to do, and also because it will take a long "time to orchestrate. Thank goodness there are no stage "rights or anything of that kind to consider this time. Would "you please let me know at the earliest possible moment "about this matter." The reply, dated September 28, 1910, was : " Dear Sir, We have carefully considered your work "' A Tale of Old Japan ' and shall be happy to publish it "if you will accept a royalty on the same basis as that paid "on your other works and provided satisfactory arrangements "can be made with regard to the words. Will you kindly "ascertain from Mr. Noyes whether he wishes to dispose of "the copyright of his words or merely to give permission "for them to be used in conjunction with your music, and "also what his fee is in each case. Assuming that this matter "is settled satisfactorily we shall be happy to pay you 25*l.* "on account of royalties as suggested by you in your letter "of September 2. We are returning the MS. by this post "so that you may be able to proceed with the orchestration."

On September 30, 1910, the composer replied : " Thank "you for your letter regarding my MS. ' A Tale of Old Japan.' "I have written to Mr. Noyes about his poem and he will "doubtless answer you direct. The terms you mention will "be quite satisfactory to me—royalty basis the same as in "the 'Bon Bon Suite' and 'Endymion's Dream' and 25*l.* "down."

The next letter, from the composer, and dated October 25, 1910, was: "Dear Mr. Clayton, I left the vocal score of "'A Tale of Old Japan' at Wardour Street last week and "am to-day sending the full score so all is now completed. "If everything is satisfactorily settled with Mr. Alfred Noyes, "may I hope to have a cheque as arranged during the week?" The answer, on November 9, 1910, was: "Dear Sir, We "have now made arrangements with Mr. Noyes' agents by "which we have acquired the sole musical rights of his poem "'A Tale of Old Japan' and also the right to authorize the "printing of the words in concert programmes. The work "can now be proceeded with, and we are enclosing a cheque "for 25*l.* on account of royalties in accordance with your "request of September 2, addressed to Mr. Clayton. Will "you kindly send us a provisional receipt for the cheque now, "as we shall want to make the cheque appear on the assignment which will be sent to you in due course."

The next document pleaded in the defence was a cheque, dated November 9, 1910, for which a receipt was signed by the composer dated November 11, 1910, and which was in the following terms: "Received of Novello & Co. Limited the sum "of twenty-five pounds for on account of royalties of 'A Tale "'of Old Japan.'"

"A Tale of Old Japan" was first published in September, 1911.

The company contended that, despite the proviso to s. 5, sub-s. 2, of the Copyright Act, 1911, the agreement of March 11, 1912, operated to vest in it the copyright for the whole of the term for which it subsisted; and contended also that the agreement of March 11, 1912, formally embodied a legal or equitable assignment of which the correspondence of 1910 was evidence.

The writ in the action was issued on August 20, 1937.

F. R. Evershed K.C. and *F. E. Skone James* for the plaintiffs. The question for decision is whether s. 5 and

s. 24 of the Copyright Act, 1911, can be construed together. The assignment by the composer was on a form of agreement printed at the beginning of 1912. The Act came into operation in July, 1912, having been passed in 1911. One of its introductions was the proviso to s. 5, sub-s. 2, that an assignment by an author, being the first owner, of his copyright, was effective only for his life and twenty-five years after it, the copyright then re-vesting in his estate. It is submitted that that would be the result of the Act no matter what the date of the assignment; but in this particular case of an assignment between the dates of the passing and the commencement of the Act, the specific provision of the Act makes it quite clear. The argument for the company is that, even supposing that the agreement of March 11, 1912, is effective to vest the copyright in the company for only twenty-five years from the composer's death, nevertheless there is a prior agreement, shown by the correspondence, so that the plaintiffs are bare trustees for the company. The difficulty is that that is a relationship unenforceable by the Court, since, now, no agreement could operate beyond the twenty-five years. Substantially the case turns on a consideration of the Act and of a few documents.

At the date when the Act came into operation, a composer's rights were regulated, in effect, by the Literary Copyright Act, 1842. There were two separate rights, first, copyright, defined as the right to multiply copies, and primarily applicable to a book but also to any printed matter, and secondly, the right to perform or represent in public, which could be quite separately disposed of. Both those rights expired after a period of forty-two years from their coming into operation or a period consisting of the life of the author and seven years after. Thus, in the present case, they would, under the Literary Copyright Act, 1842, have expired on September 1, 1953.

The effect of s. 24 of the Copyright Act, 1911, is that a person who was, on June 30, 1912, entitled to copyright or performing right under the Literary Copyright Act, 1842, is entitled to it under the Copyright Act, 1911, but only for such a term as it would have subsisted for if the Act had been in operation when that person (in this case the composer) composed his work. Sect. 24 provides, in effect, that where any person is entitled to the old right the Act gives him the new right for the same length of time as he would have got it for if the Act had been in operation when he got it.

The Dramatic Copyright Act, 1833, makes no mention of any term of years, and there is some doubt whether the right of performance, at any rate in the case of a published work, was limited in point of time or not. There are other Acts which show that, up to 1911, the word " copyright," although it had a limited significance, was used in a general sense. [They referred to the Interpretation Act, 1889, s. 36.] In *Thompson* v. *Warner Bros. Pictures, Ld.* (1), it was used as meaning the old literary copyright and also the right of performance and publication.

If it comes to a conflict between the proviso to s. 5, sub-s. 2, and the proviso to s. 24, sub-s. 1, of the Copyright Act, 1911, refuge may always be taken in the fact that the former is dealing with a specific matter and the latter with generalities, and in the principle that the generality must give way to something specific. In the present case the composer was, qua composer, entitled to his work save as against an assignee, and the company claims to be an assignee. In the proviso to s. 24, sub-s. 1 (*a*), the words "interest . . . . created" in the expression " any interest " (in the right) " created before "the commencement of this Act and then subsisting shall "determine" can apply only to the interest created in the substituted right before the " commencement " (i.e., the coming into operation) of the Act, which would vest in the author on the coming into operation of the Act. At the date when the Act came into force the widow had a reversionary right to the copyright. [They referred to *Leggott* v. *Barrett* (2) and *Millbourn* v. *Lyons*. (3)]

The Court is asked to bear in mind three characteristics of the agreement of March 11, 1912: first, it is an assignment of the rights of copying and public performance; secondly, the work is stated to be a cantata for solo, chorus and orchestra; and, thirdly, the royalty was threepence three farthings. What the company regards as the crucial part of the bargain was the form which it required the composer to sign.

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(1) [1929] 2 Ch. 308.
(2) (1880) 15 Ch. D. 306.
(3) [1914] 2 Ch. 231.

The Copyright Act, 1911, should be construed as has been suggested. Assume that, in 1910, when there did not exist any final work—the first work taking final shape in September, 1911—there was some sort of proleptic assignment, there will also arise the question what operation s. 24 had on that. It does not matter whether the effect of any agreement made in 1910 was to create a legal or an equitable interest. It may well be that it substituted for the right in the company either a legal or an equitable right for the same term. The Court will read s. 5 and s. 24 together, and will conclude that there is no conflict at all. The substituted right which is thereby vested in the company subsists in the company only for the term which has already been ordained. Further, there was in the composer a reversionary interest for which has been substituted the reversionary interest in the substituted right. Any conflict between s. 5 and s. 24 is due to the fact that, in the proviso to s. 5, sub-s. 2, "copy-" right" means the old copyright, and "the passing of this "Act" means the time of the giving of the Royal Assent. If there has been an equitable assignment, it may be said that, although it did not operate to give a legal interest in the substituted right, it may have given an equitable interest in it.

In the proviso to s. 5, sub-s. 2, the words are quite clear. The word "commencement" is one which has been given statutory significance, and it is used from time to time. [They referred to Scrutton on The Law of Copyright, 3rd ed., p. 95.] There are good reasons to suppose that it was the deliberate intention of the statute to say "'the passing'" as against "'the commencement' of this Act." The case is one in which there is an obvious distinction between "passing" and "commencement," and it is impossible so to construe the proviso as to make it say something which it does not say. The object of the present proceedings is the ascertainment of rights and interests after the Act has come into operation: it is perfectly legitimate to achieve that by seeing what they were just before it came into operation. That test reveals that, notionally, certain assignments had a limited effect and a limited effect only. In Maxwell's Interpretation of Statutes, 8th ed., p. 156, the learned author says: "A "general later law does not abrogate an earlier special one by "mere implication. Generalia specialibus non derogant, ..." It is therefore true to say that, if there is an obviously clear intention expressed in the proviso to s. 5, sub-s. 2, of the Copyright Act, 1911, the Court's duty is so to construe later parts of the statute as to give effect to the earlier part.

The proviso to s. 5, sub-s. 2, really falls into two halves. The first half is the limitation of assignments to the period of twenty-five years from the author's death; the second is the vesting of the reversionary interest in his personal representatives and is a quite independent provision, possibly inserted by the draftsman in order to get over just such a difficulty as arises in the present case. Sect. 5, sub-s. 2, has no relation to a case in which copyright is in the first instance vested in some one under s. 24, sub-s. 1.

K. E. Shelley K.C. and *E. J. Macgillivray* for the company. Sect. 5, sub-s. 2, is a complete code of the assignment of copyright, and, if there is compliance with it, it is quite immaterial whether the assignment be called legal or equitable. The effect of it is to vest the copyright in the assignee. The letters on which the company, in the present case, relies, are signed by the composer, and that is enough. The terms of the writing must sufficiently indicate the right assigned, and here they do so. The work is in existence and its identity is defined. Quite plainly, in the first letter, the composer is saying that it is an orchestral work, that he proposes to orchestrate it and that, naturally, the orchestration will be part of the work. In the company's reply the expression "royalty on the same basis" does not mean "at the same "rate." It is much wider than that, and contains the idea, not only of amount, but of the nature of the right in respect of which the royalty is paid. Every condition necessary for a complete assignment under s. 5, sub-s. 2, is present, and that is long before the passing of the Act. The company pleads the receipt of November 11, 1910, and the covering letters of October 25 and November 9, 1910. There is plain evidence that on October 25, 1910, the orchestration was complete. The letters and the receipt for the cheque constitute a legal assignment. Under the Literary Copyright Act, 1842, there is no formality of assignment, but it will not be disputed that the formality necessary then was that there should be writing sufficient to identify the copyright and the terms on which it was to be assigned : *London Printing and Publishing Alliance, Ld.* v. *Cox* (1) ; *Leggott* v. *Barrett.* (2) Those were cases in which an attempt was made to vary the terms of a final by reference to a former agreement. Here, that has not to be done. If the letters constituted not a legal but an equitable assignment, full effect must be given to the equitable assignment, for not to do so would defeat the whole object of equity. This is an infringement action. The plaintiffs say that they are entitled to the copyright and that the company is infringing it. They must therefore satisfy the Court that they are the owners of the copyright and that the company is infringing it. If the plaintiffs have, or their predecessor has, made an equitable assignment, they have, or he has, consented to the company's doing what it proposes to do. There is here an equitable assignment as between grantor and grantee. Therefore the company is doing what it is doing with the plaintiffs' consent. [They referred to *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (3)] The company is owner in equity, being an assignee from the plaintiffs, and it would therefore be unconscionable in the plaintiffs to sue for infringement. If the letters constitute an assignment, nothing can defeat the company's equitable title, and the action cannot be maintained. First, the company claims that it has a legal assignment and that that is the end of the case : but if it has not, it says that it has an equitable assignment and that that is likewise an end of the case. In *Millbourn* v. *Lyons* (1) the conveyance was not in fact in accordance with the contract, and that was the ratio decidendi. That case is distinguished from the present case by the fact that the question there was whether, when there is an inconsistency between two documents, the Court should look at the second document.

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(1) [1891] 3 Ch. 291.
(2) 15 Ch. D. 306.
(3) [1924] A. C. 1.

It is possible to read s. 5, sub-s. 2, of the Copyright Act, 1911, giving to each word its plain and natural meaning, without any inconsistency whatever. "Passing" of the Act means "commencement" of the Act, but it is still possible to give every word its plain and natural meaning, and there is no inconsistency.

With regard to the word "subsist" in s. 24, sub-s. 1, that word is used throughout the Act in section after section without any reference whatever to the ownership of the right. Therefore, taking it as a matter of plain meaning, the word "subsist" relates to time only, and not to ownership at all. Not only is that the plain meaning of that sub-section, but it is the necessary meaning having regard to other parts of the Act. To come within s. 24, a person must be entitled to copyright immediately before the commencement of the Act. If that condition is fulfilled, then, necessarily, immediately after the passing of the Act the right subsists for the life of the author and fifty years, and the owner has it for that period. For the plaintiffs it is argued that that view, even assuming it to be right, cannot be reconciled with s. 5, sub-s. 2: but it can be reconciled with it. It is based on s. 24, sub-s. 3, always remembering that s. 24, sub-s. 3, is an overriding provision with regard to works before the Act. [They referred to *Macdonald, Ld.* v. *Eyles*. (2)] The proviso to s. 24, sub-s. 1, deals with the right to agree to extend the time. The proviso to s. 5, sub-s. 2, is much more stringent, but that does not matter, because s. 24 has itself expressly dealt with inconsistency and provides that it shall itself be overriding. Those words were put in to deal with such a case as the present. The two provisos cannot stand together. One or the other must

(1) [1914] 2 Ch. 231.

(2) [1921] 1 Ch. 631.

be chosen, and the Legislature has itself told the Court that, in the case of a pre-Act work, the proviso to s. 24, sub-s. 1, shall apply, and that to s. 5, sub-s. 2, shall not apply: *Falcon* v. *Famous Players Film Co.* (1)

On the assumption that there has been, in the present case, an assignment after the "passing" but before the "commencement" of the Act, the company is nevertheless entitled to the substituted right given by s. 24, sub-s. 1. But it is submitted that the phrase "passing of this Act," wherever it occurs, means "commencement" of the Act. *Wood* v. *Riley* (2) is the only authority for saying that "passing" of an Act does not mean "passing." [They referred to *Rex* v. *Smith.* (3)]

F. R. Evershed K.C. and *F. E. Skone James* in reply referred to White and Tudor's Leading Cases in Equity, vol. i., p. 97; *Ryall* v. *Rowles* (4); *Brandt's* (*William*) *Sons & Co.* v. *Dunlop Rubber Co.* (5); and *Pretty* v. *Solly.* (6)

MORTON J. [after stating the facts:] The Copyright Act, 1911, came into operation in the United Kingdom on July 1, 1912. There were two rights under the Literary Copyright Act, 1842, one being (putting it shortly) a right to make copies of the work, and the other being a right to perform it. I think it is the fact that, in the Act of 1911, the word "copyright" is sometimes used as referring to those rights which were in existence under the Act of 1842, before the Act of 1911 came into operation. This copyright—using the word in the comprehensive sense as meaning the rights vested in the composer before the 1911 Act—would have expired, under the Act of 1842, forty-two years from the publication of the work or seven years after the composer's death, so that, in the events which have happened, it would expire in September, 1953.

The first point arising in this action is a very curious point of construction. It will be observed that the assignment of

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(1) [1926] 2 K. B. 474.
(2) (1867) L. R. 3 C. P. 26.
(3) [1910] 1 K. B. 17.
(4) (1749) 1 Ves. Sen. 348.
(5) [1905] A. C. 454.
(6) 26 Beav. 606.

March 11, 1912, was executed between the passing of the Copyright Act, 1911, and its coming into operation. It is provided by a proviso to s. 5, sub-s. 2, of the Copyright Act, 1911, as follows: [His Lordship read the proviso, and continued:] The plaintiffs say that, by reason of that proviso, the copyright in the work as from September 1, 1937—that being the expiration of twenty-five years from the composer's death—became their property, or, alternatively, the property of the widow as the composer's legal personal representative: and they allege that the company claims that the copyright in the said work remains vested in it after September 1, 1937, and threatens and intends to reproduce and perform in public the work after September 1, 1937, and to authorize the reproduction or performance thereof after that date; and they claim a certain declaration (which I need not at the moment read at length) and an injunction.

The company raises two quite separate defences. One is based solely on the construction of the Copyright Act, 1911, under which head the company says that, notwithstanding the proviso to s. 5, sub-s. 2, the assignment of March 11, 1912, did operate to vest in it the copyright in the work for the whole term for which the copyright subsists. The other contention is based upon certain earlier correspondence between the parties, to which I must refer later.

Dealing first with the argument based upon the construction of the statute, I would first observe that there is no doubt here that the composer was the first owner of the copyright, using the word "copyright" in the sense of those rights which are conferred by the Literary Copyright Act, 1842. With regard to the words "after the passing of this Act," I have been invited by counsel for the company to construe them as if they read: "after the commencement of this "Act." I entirely decline to put that construction upon the word "passing." The word "passing" is used in several places in the Copyright Act, 1911, as is also the word "commencement." As far as the word "commencement" is concerned, by s. 36, sub-s. 1, of the Interpretation Act, 1889: "In this Act, and in every Act passed either "before or after the commencement of this Act the "expression 'commencement,' when used with reference to "an Act, shall mean the time at which the Act comes into "operation."

With regard to the word "passing," I would first refer to the case of *Ex parte Rashleigh. In re Dalzell.* (1) I need not refer to the facts of the case. James L.J. says: "I am of opinion that in the Act of 1869" (i.e., the Bankruptcy Act) "the words 'the date of the passing of the Bankruptcy "'Act, 1861,' mean what they say. They are English words, "common words, and words which have a fixed meaning in "our language and law. They mean the time when the "Royal Assent is given to a bill which has passed both Houses "of Parliament. That is the meaning of the words, and no "Court ought to depart from the plain meaning of plain "English words, unless coerced to do so by some very serious "injustice, a hardship which would arise from a literal "interpretation, for instance, where the literal interpretation "would, in the opinion of the Court, operate so harshly that "the Court would be driven to suppose that there must have "been some clerical mistake in the language of the Act, or "deed, or whatever may be under consideration."

I do not find in the present case that I am in any way coerced to construe the word "passing" as if the word "commencement" had been used.

To the same effect is a passage in the case of *Rex* v. *Smith* (2), where Lord Alverstone said: "It is said that, because of "this necessity of postponing the date of the Act coming "into operation, we ought to read the words 'after the "'passing of this Act' in s. 10 in their non-natural meaning. "In order to justify our doing so we must find some necessary "implication to that effect in the Act itself, or the nature "of the Act must be such as to compel us to come to that "conclusion."

I can find no useful reason, although I have carefully attended to the ingenious argument of counsel for the company, why I should construe the word "passing" in its non-natural

(1) (1875) 2 Ch. D. 9, 12, 13.

(2) [1910] 1 K. B. 17, 25.

sense. On the contrary, it seems to me that there might be very good reason for the Legislature inserting this provision to safeguard the estates and the legal personal representatives of authors against some of the results which might otherwise accrue from an assignment of the copyright. I think it is quite likely, although this must be mere speculation, that in using the word "passing" the Legislature had in mind that, when the Act was passed and its contents were common property, there might possibly be a very large number of assignments of copyright, and that the Legislature intended in that event to make special provision with regard to those assignments. However that may be, I construe the word "passing" as bearing its ordinary meaning. It seems to me that, if it is so construed, the word "copyright" where it first occurs in the proviso must apply not only to the copyright under the Act of 1911, but also to the rights which existed before the passing of that Act. Indeed, this is conceded by Mr. Shelley. So far as regards the use of the word where it appears in the proviso for the second time, in the words "no assignment of copyright," here also the word includes the rights which existed before the passing of the Act. If, as I think, the proviso is referring to assignments which may be executed before the 1911 Act had come into operation—that is to say, in the interval between its passing and its coming into operation—it seems to me necessary to construe the word "copyright" as extending to the rights which existed before the Act was passed. The result is that this proviso seems to me to cover in the clearest possible terms the very case with which I am dealing, a case in which the author of the work is the first owner of the copyright therein and there was an assignment of the copyright after the passing of the Act; and unless I can find something in the language of the rest of the Act which compels me to depart from what seems to be the clear meaning of these words, I should feel disposed to give these words in the proviso to s. 5, sub-s. 2, their full effect.

It has been argued by counsel for the company that, in the circumstances with which I have to deal, what otherwise would have been the effect of this proviso is nullified by the provisions of s. 24 of the Act. Sect. 24—I read certain portions of it—is as follows: [his Lordship read the relevant parts of the section, and continued:] Counsel for the company says, and I agree with him, that the words "such substituted right shall subsist" have reference only to the time during which the right will subsist or continue, and are not referable to the ownership of the right. He also says that the company was, immediately before the commencement of the Act, entitled to both the copyright and performing right under the former Act; that it is now entitled to the copyright as defined by this Act; and, further, that it is entitled to that right not merely for the twenty-five years which are laid down by the proviso to s. 5, sub-s. 2, but for the more extended period during which it would have been entitled to it but for that proviso.

I do not propose to go in detail through the provisos to s. 24, although they are of importance in considering the matter, or to state in detail the ingenious argument which has been addressed to me on the subject. Counsel for the company also relies upon s. 24, sub-s. 3, which is in the following terms: [his Lordship read the sub-section, and continued:] He says, in effect, that that sub-section sweeps away the provisions of the proviso to s. 5, sub-s. 2, so far as they relate to an assignment of a copyright under the earlier Acts made after the passing of the Copyright Act, 1911, but before its commencement. I do not feel disposed to give the sub-section that operation. It seems to me that I ought, if possible, to make the various sections harmonize with one another. I think the explanation of any apparent inconsistency must be this: that s. 24, sub-s. 3, is a sub-section dealing with the transition from copyright under the earlier Acts to copyright under the 1911 Act, and that it was not intended, by such a sub-section, to take away the rights which had previously been given to the legal personal representatives of an author by the proviso to s. 5, sub-s. 2. Mr. Evershed and Mr. Skone James, for the company, suggested alternative versions as to the true meaning of the phrase "copyright shall not subsist" in s. 24, sub-s. 3. Mr. Skone James's suggestion was that it means: "there shall be no copyright in any work made before the "commencement of this Act, unless by this section new "copyright is substituted for existing copyright in respect "of that work." In this case it is not disputed that, in respect of "A Tale of Old Japan," a new copyright was substituted for the existing copyright. Mr. Evershed's suggestion was "every copyright, except those rights which "are dealt with in s. 19, sub-ss. 7, 8, and in s. 33, shall be "subject to the provisions of and shall comply with this "section." Perhaps one might multiply examples of how the true meaning of the section ought to be put, but in my view I am not compelled to construe it as taking away the rights already given by the proviso to s. 5, sub-s. 2, and I do not propose so to construe it: I propose to rest upon what I conceive to be a firm rock on this question of construction: that the words of the proviso to s. 5, sub-s. 2, directly apply to this particular transaction, word for word; and I can find nothing in the rest of the Act which compels me to refrain from giving these words what I think is their very clear meaning. I may add that if the two sections were otherwise irreconcilable, there is the principle, which I think I should be disposed to apply, which is laid down in Maxwell's Interpretation of Statutes, 8th ed., p. 156: "Having "already given its attention to the particular subject and "provided for it, the Legislature is reasonably presumed not "to intend to alter that special provision by a subsequent "general enactment unless that intention be manifested in "explicit language, or there be something which shows that "the attention of the Legislature had been turned to the "special Act and that the general one was intended to "embrace the special cases provided for by the previous "one, or there be something in the nature of the general one "making it unlikely that an exception was intended as regards "the special Act. In the absence of these conditions, the "general statute is read as silently excluding from its operation "the cases which have been provided for by the special one."

That passage, which is based on certain well known authorities cited in the notes, is dealing with the question of two separate Acts, one a special Act and the other a general Act, but the same principle has been applied to two different sections of the same Act.

In *Pretty* v. *Solly* (1) the principle was laid down by Sir John Romilly M.R. in the following words: "The general "rules which are applicable to particular and general enact-"ments in statutes are very clear, the only difficulty is in "their application. The rule is, that wherever there is a "particular enactment and a general enactment in the same "statute, and the latter, taken in its most comprehensive "sense, would overrule the former, the particular enactment "must be operative, and the general enactment must be "taken to affect only the other parts of the statute to which "it may properly apply."

I now have to turn to the second defence, which is pleaded in the following way: "The said instrument was executed "in pursuance of and was a formal embodiment and/or "specific performance of an agreement previously made "between the parties thereto in or about September, 1910, "which agreement is evidenced by and expressed in the "following documents that is to say——"

Then there are set out a number of letters. It has been argued before me that the correspondence amounted to a legal assignment of the copyright in 1910, or, alternatively, that it amounted to an equitable assignment of the copyright, and that in either event, assuming that the assignment of March 11, 1912, conveyed nothing more to the company than the copyright for the life of the composer and the period of twenty-five years after his death, the company is still entitled to the copyright after the expiration of that period by reason of the fact that there was in 1910 this equitable or legal assignment. In order to ascertain whether there was a legal assignment, in the first place it is necessary to look at the letters. [His Lordship then read the letter of September 2, 1910, from the composer to Mr. Clayton and the reply of September 28, 1910, to that letter, and continued :] It is to be observed that there is a reference there to a royalty "on the same basis as that paid on your other works." Counsel for the company contended that the words "on the "same basis" refer not merely to the rate of remuneration, but to other matters. I am inclined to the view that that argument is ill founded, because the "other works" are identified in the next letter, and it is plain from the evidence that one of them had not in fact been assigned to the company at the date of the letter.

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(1) 26 Beav. 606, 610.

[His Lordship then read the composer's reply of September 30, 1910, to Mr. Clayton, and continued :] The assignments of the "Bon Bon Suite" and "Endymion's Dream" are before me. The former assignment is in the same form, I think, as the assignment of March, 1912; it is dated March 4, 1908, and the royalty payable is 3*d.* per copy. The assignment of the copyright of "Endymion's "Dream" is dated March 30, 1911; the royalty again is 3*d.* per copy, and the rights assigned are not identical with the rights which were assigned in the case of the "Bon Bon "Suite"—certain exceptions are made.

The position then was that the terms appear to have been satisfactory to both parties, as far as remuneration goes. There is this doubt still, whether the royalty payable under the assignment of March 11, 1912, as ultimately executed, is on the same basis as the royalty payable under the other two assignments.

It is quite true that in each case, as I understand the evidence, the royalty is one-eighth of the original published price; but, on the strict interpretation of the assignment of March 11, 1912, if the published price were altered the royalty would remain the same—namely, $3\frac{3}{4}$*d.*

[His Lordship then read the composer's letter of October 25, 1910, telling Mr. Clayton that he was sending the full score and asking if he might have a cheque if everything was settled with Mr. Alfred Noyes, and continued :] Counsel for the company says that at some stage there was a complete legal assignment, and he, I think, in the latter part of his argument fixed this letter as the final stage. He said that there was a complete assignment subject to a condition—that is, the arrangement with Mr. Noyes—which was afterwards fulfilled; but I think it is necessary, in order to see whether that is the correct view of the matter, to look at the correspondence as a whole, including the answer to that letter.

[His Lordship then read the letter and the cheque of November 9, 1910, and the receipt for the cheque of November 11, 1910, and continued:] In my view, the real meaning and effect of the correspondence is that the parties contemplated and intended that there should be a formal assignment of the copyright by Mr. Coleridge-Taylor to the company; that was the end to which the correspondence was leading up, and Mr. Coleridge-Taylor finally did execute a formal assignment of the copyright to the company. If no formal assignment had been executed I might have had to consider in more detail whether I could find in the earlier documents an assignment or an agreement to assign; but in my view, upon the authorities which have been cited to me, to which I will refer briefly, if I form the view, as I do, that the parties intended to carry out this transaction by a formal assignment, and if I find, as I do, that the formal assignment was executed, I am not entitled to go back behind that formal assignment and ascertain what was the position and what were the negotiations, and whether the negotiations ever did or did not reach the stage of what would have been held to be an equitable assignment if the parties had not intended all along to carry out the matter by a formal assignment.

With regard to the question whether the earlier documents do amount to an assignment, there is one other matter to which I should refer before I cite the authorities. It has been pointed out by counsel for the plaintiffs in his speech in reply that under s. 22 of the Literary Copyright Act, 1842, which I need not read at length, the letters in question, even if they amounted to an equitable assignment of the right to reproduce or multiply copies of the work, could not amount to an assignment of the right of performance. This contention seems to me well-founded.

The cases to which my attention has been called with regard to the alleged assignment of 1910, first taking the case cited by counsel for the company, are these : first, *London Printing and Publishing Alliance, Ld.* v. *Cox.* (1) In that case it was held by a majority of the Court of Appeal that the title to a certain copyright passed by virtue of a certain letter, but Fry L.J., who delivered the judgment of the majority of the Court of Appeal, in my view laid emphasis upon this : that in the case before him it was never intended that any further document of assignment should be executed. He said, with regard to an earlier document: " It does not appear to me "to have been intended that any further assignment in "writing should be executed" ; and with regard to a subsequent letter he said : " The intention of both "parties was that the picture should pass at once. . . . ." In my view, that case does not cover the present case, where, as I have said, I think the intention of the parties was otherwise.

Counsel for the plaintiffs has referred me to a passage in White and Tudor's Leading Cases in Equity, 9th ed., vol. 1, p. 105, which is : " No rule can be laid down as to the form requisite "for a valid equitable assignment. In Lord Macnaghten's "speech in *Brandt's (William) Sons & Co.* v. *Dunlop Rubber "Co.* (2) he referred to the contention that the document "relied upon in that case did not use the language of an "assignment, and proceeded : ' An equitable assignment "' does not always take that form. It may be addressed "' to the debtor. It may be couched in the language of "' command. It may be a courteous request. It may "' assume the form of mere permission. The language is "' immaterial if the meaning is plain. All that is necessary "' is that the debtor should be given to understand that "' the debt has been made over by the creditor to some "' third person. If the debtor ignores such a notice he does "' so at his peril.' " Then there is a further quotation on the

(1) [1891] 3 Ch. 291, 303.

(2) [1905] A. C. 454, 462.

same page: "'The mode or form of assignment is absolutely "'immaterial provided the intention of the parties is clear.'" Then on page 109, under the heading "Where no Equitable "Assignment is created," the learned authors say: "The "intention, however, to assign or to create a charge must "be shown. Thus, a mere letter of instruction to a banker "not written with any intent to create a charge on a fund "in his hands, will not amount to an equitable assignment. "'You can have no charge in equity without an intention "'to charge,' said Jessel M.R. 'The letter on which you "'rely was not written with any intent to charge the fund; "'it was a mere letter of instructions to the bankers.'"

On rather a different aspect of the case, counsel for the plaintiffs called my attention to the case of *Millbourn* v. *Lyons* (1), where reference was made to the earlier case, also cited by counsel for the plaintiffs, of *Leggott* v. *Barrett.* (2) In the case of *Millbourn* v. *Lyons* (I quote the headnote): "In December, 1898, the owner in fee of an hotel agreed to "sell it to H., the predecessor in title of the plaintiffs. The "contract provided that the conveyance should contain a "covenant by H. restrictive of the user of the hotel for the "benefit of adjoining houses and lands of which the vendor "was owner in fee but under a different title. It was a "residential neighbourhood, but the contract was no part "of a building scheme. The purchase was completed in "December, 1899, and the conveyance contained a covenant "by H. in the terms of the restrictive stipulation with the "executors of the vendor, who had died. Between the date "of H.'s contract and the date of completion all the vendor's "houses and lands adjoining the hotel were put up for sale "by public auction in lots subject to conditions of sale which "made no reference to H.'s contract or to the restrictive "stipulation. All the lots were sold and conveyed to various "purchasers before December, 1899." Then there was a sale by the plaintiff to the defendant of the hotel free from restrictions, and the question arose as to whether the restrictive stipulations in H.'s contract and conveyance bound the defendant. It was argued by counsel for the appellant in that case (the appellant being the defendant) that the agreement for sale created an equitable right which ran with the land, "and it can be enforced by the vendors, their heirs and "assigns, owners, and occupiers of the adjoining property, "even though they did not know of the existence of the "restriction." In dealing with that argument the Master of the Rolls said (1): "Mr. Jenkins and Mr. Methold say "this: Whenever you have a contract in writing, that makes "in equity the purchaser the owner of the estate, and "if by the contract there is anything in the nature of a "restrictive agreement, that creates an interest in the whole "of the estate which at the date of the agreement was intended "to be protected by the agreement, and that the benefit of "that inheres to every part of the estate in this sense, that the "purchasers of the adjoining property, although they knew "nothing about it, took the benefit of it; and *Rogers* v. "*Hosegood* (2) is cited for that purpose. I think that that is "a mistake and, if I may venture to say so, a dangerous "mistake. It is a mistake because, speaking generally, it is "perfectly clear that when you have a conveyance which "expresses the final concluded deliberate terms of the contract "between the parties you cannot affect or alter that by reference "to the antecedent contract. The case which Mr. Peterson "referred to of *Leggott* v. *Barrett* (3) puts that extremely "strongly"—then he quoted a passage from the judgment of Brett L.J. in *Leggott* v. *Barrett*. (3)

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(1) [1914] 2 Ch. 231, 240, 243. (2) (1880) 15 Ch. D. 306.

In this case we have an assignment which, in my view, expresses the final, concluded, deliberate terms of the contract between the parties, and it was always contemplated, in my view, that there should be such an assignment.

Swinfen Eady L.J., in dealing with the same point, said (4): ". . . . but if the argument that has been "addressed to us is well founded, and if the mere contract "was to bind the land, there would have to be in every case "an agreement put on the title which would revolutionize

(1) [1914] 2 Ch. 240.
(2) [1900] 2 Ch. 388.
(3) 15 Ch. D. 306.
(4) [1914] 2 Ch. 243.

"the practice of conveyancing. Not only that, but it would "be a departure from the well-established principles that "when you have negotiations leading up to a contract you do "not look at the negotiations to construe the contract in "writing, you only look to the written contract, and so where "there is a contract followed by a conveyance you look at "the terms of the conveyance." He then quotes the words of James L.J. in *Leggott* v. *Barrett* (1), which are as follows: "'It is very important, according to my view of the law of "'contracts, both at common law and in equity, that if parties "'have made an executory contract which is to be carried "'out by a deed afterwards executed, the real completed "'contract between the parties is to be found in the deed, "'and that you have no right whatever to look at the contract, "'although it is recited in the deed, except for the purpose of "'construing the deed itself. . . . .'"

Even if I look behind the formal document of March 11, 1912, I do not think that there was anything which amounted to an assignment at law or in equity. I think the whole matter must rest upon the effect of the assignment of March 11, 1912. That assignment, by reason of the provisions of the Copyright Act, 1911, to which I have already referred, operated, in my view, to grant the copyright to the company for the period only of twenty-five years from the composer's death.

The result is that, in my view, the plaintiffs are entitled to the copyright in "A Tale of Old Japan" as from the termination of the period of twenty-five years from the composer's death, which occurred on September 1, 1912, free from any right or interest of the company therein. I will give liberty to apply for an injunction. The company will pay the costs of the action.

Solicitors: *Syrett & Sons; Field, Roscoe & Co.*

(1) 15 Ch. D. 306.

K. R. A. H.

SIMONDS J.

1938

March 30.

In re HARWARD.

NEWTON *v.* BANKES.

[1938. H. 325.]

Will—Construction—Absolute gift by will—Legacy settled by codicil—Death of legatee in lifetime of testatrix—No lapse—Legacy held on remaining trusts of codicil.

A testatrix by her will gave a pecuniary legacy of 5000*l.* to her married daughter G. By a codicil executed some months later the testatrix directed her trustees to retain and invest the legacy, and to pay the income to G. during her life without power of anticipation, and after her death to hold the capital and income upon trust for the persons who on the death of G. would be the next of kin of the testatrix under the Administration of Estates Act, 1925, as if she (the testatrix) had died intestate and without having been married. G. predeceased the testatrix:—

Held, that the legacy did not lapse and fall into residue, but was held by the trustees for the persons entitled under the settlement created by the codicil.

In re Pinhorne [1894] 2 Ch. 276 and *In re Powell* [1900] 2 Ch. 525 followed and applied.

SUMMONS.

The testatrix, Elizabeth Ann Harward, by her will dated December 23, 1932, appointed Sir Louis Arthur Newton, Bt., and the Westminster Bank, Ld., executors and trustees of her will, and, after bequeathing certain specific legacies to her sisters, she directed that her trustees should stand possessed of the residue of her real and personal estate in trust (*a*) as to 5000*l.* part thereof for her sister Eliza Eales Bankes absolutely, (*b*) as to a further sum of 5000*l.* further part thereof for her sister Jane Stevenson Macey absolutely, (*c*) as to a further sum of 5000*l.* further part thereof for her daughter Gwendoline Ida Huggins absolutely, and (*d*) as to all the rest residue and remainder of her residuary trust fund in trust for fifteen named persons in equal shares absolutely.

By a codicil dated October 23, 1933, the testatrix directed that her trustees should hold the legacy of 5000*l.* bequeathed by her will to her daughter Gwendoline Ida Huggins upon trust to invest the same, and to pay the income thereof to her during her life without power of anticipation, and after her death to hold both the capital and income in trust for

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the persons who would on the death of her daughter be the testatrix's own statutory next of kin under the Administration of Estates Act, 1925, as if she (the testatrix) had died possessed thereof intestate and without having been married.

The testatrix died on January 3, 1937, and her said will and codicil were duly proved by Sir Louis Arthur Newton on February 22, 1937, the Westminster Bank having renounced probate thereof.

Gwendoline Ida Huggins predeceased the testatrix, having died on July 23, 1934. She never had any issue. The fifteen persons entitled to the residue of the testatrix's estate, thirteen of whom were nephews and nieces of the testatrix, were all living and had all attained the age of twenty-one years. The next of kin of the testatrix included all these and several other persons. The summons was taken out by the trustee for the determination of certain questions arising on the will and codicil of the testatrix, including the following: (1.) whether the legacy of 5000*l.* bequeathed by clause 6 (*c*) of the will lapsed by reason of the death of Gwendoline Ida Huggins in the lifetime of the testatrix, or whether notwithstanding her death the same was held upon the trusts declared by the codicil; (2.) if the legacy lapsed, whether it fell into the rest residue and remainder of the residuary trust fund, or passed as on an intestacy of the testatrix.

A. P. Vanneck for the plaintiff.

E. M. Winterbotham for the defendant Eliza Bankes, representing the testatrix's next of kin. The legacy has not lapsed by the death of Mrs. Huggins. The legacy was a settled legacy and the death of the tenant for life cannot cause a lapse. The cases in which it has been held there was a lapse are cases of settled shares of residue, not of legacies, such as *In re Roberts.* (1) The decisions in *In re Pinhorne* (2) and *In re Powell* (3) are more like the present case and should be followed.

C. L. Fawell for a defendant representing the residuary

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(1) (1885) 30 Ch. D. 234.
(2) [1894] 2 Ch. 276.
(3) [1900] 2 Ch. 525.

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legatees. The settlement was only a settlement of the legacy to the daughter of the testatrix on the assumption that she survived the testator. That is shown by the fact that on the death of Mrs. Huggins the legacy goes not to Mrs. Huggins' next of kin, or the persons who would have been her next of kin if she died intestate and a spinster, but to the next of kin of the testatrix—persons who could not be ascertained when Mrs. Huggins died, for the testatrix was still alive. If there is no lapse, then, as Cotton L.J. said in *In re Roberts* (1), a curious and whimsical result is reached by adopting such a construction.

The gift by the will of the legacy was an absolute one, and the codicil, executed nine months later, was to settle the legacy. Owing to the death of Mrs. Huggins before the testatrix, there was nothing to settle, and therefore the 5000*l.* falls into the residue. There are no words of revocation of the absolute gift, but the settlement is superadded. The principle of *Lassence* v. *Tierney* (2) applies; there is nothing on which the settlement can operate. In every case in which this point has arisen and the decision has been contrary to my contention, except *In re Whitmore* (3), the trusts engrafted on to the original gift were so bound up with it that it was impossible to separate the gift and the settlement. Such cases were *In re Pinhorne* (4) and *In re Powell* (5), where the successive interests followed immediately on the original gift. But here the settlement is quite distinct, and contained in a codicil executed nine months after the will by which the legacy is given. The curious form of the gift over shows that the testatrix only intended the gift to take effect if her daughter survived her.

SIMONDS J. In this case the testatrix made her will on December 23, 1932, and thereby directed that her trustees should stand possessed of her residuary trust fund in trust as to 5000*l.* part thereof for her sister Eliza, as to a further sum of 5000*l.* part thereof for her sister Jane, as to a further

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(1) 30 Ch. D. 234.
(2) (1849) 1 Mac. & G. 551.
(3) [1902] 2 Ch. 66.
(4) [1894] 2 Ch. 276.
(5) [1900] 2 Ch. 525.

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sum of 5000*l.* further part thereof for her daughter Gwendoline, and as to all the rest, residue and remainder of the trust fund in trust for certain persons in equal shares.

The question before me arises on the gift of 5000*l.* out of the residuary trust fund to the daughter Gwendoline. The testatrix having made that testamentary disposition by her will, made a codicil on October 23, 1933. The material part of the codicil is in clause 3, which is in these terms: "So "far as the legacy of 5000*l.* part of my residuary trust fund "bequeathed by my will to my daughter Gwendoline is "concerned I direct that my trustees shall stand possessed "thereof upon trust to invest the same in their names or "under their control in or upon any investments for the "time being authorized by law for the investment of trust "funds with power for my trustees at their discretion to "change such investments for others of a like nature, and "to stand possessed of the investments . . . . for the time "being representing the same (hereinafter called 'the "'daughter's trust fund') upon trust to pay the income "thereof to the said Gwendoline Ida Huggins during her "life without power of anticipation either during her "coverture or during her widowhood, and after her death "I direct that the capital and income of the daughter's trust "fund shall be held in trust for the persons who would on "the death of my daughter as my statutory next of kin under "the Administration of Estates Act, 1925, have become "entitled thereto, as if I had died possessed thereof intestate, "and without ever having been married, such persons to take "as tenants in common in the same shares in which they "would have taken under that Act."

The testatrix died on January 3, 1937, but on July 23, 1934, that is to say, between the date of the codicil and the death of the testatrix, her daughter Gwendoline had died, and the question which now arises is whether the gift of 5000*l.* to her takes effect so far as the reversionary legatees named in the codicil are concerned, or whether there is a lapse. I must say exactly what Cozens-Hardy J. said in *In re Powell.* (1)

(1) [1900] 2 Ch. 525.

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NEWTON *v.* BANKES.

Reading this will, apart from authority, I think it is pretty plain that the testatrix intended that her daughter Gwendoline should take a life interest only in the sum of 5000*l.*, part of the residuary trust fund. That is, I think, the plain meaning to be derived from the consideration of the will and codicil of the testatrix. Is there, then, anything in the authorities which precludes me from coming to that conclusion ? Authorities are only useful so far as they lay down some canon or principle of construction. If there is any canon or principle of construction governing the interpretation of this will I must follow it. I think that the only rule of construction is that I must look at all the words of the will and codicil and give them their proper effect so as from the consideration of them all to arrive at the intention of the testatrix. Having done that, I come to the same conclusion. The words properly construed have this meaning and this meaning only, that the testatrix intended a sum of 5000*l.*, part of her residuary trust fund, to be enjoyed by her daughter Gwendoline for her life and after her death by a number of other persons, whom she described, in equal shares.

This is not a case in which the testatrix has made a gift to persons in succession of something which is described as a sum of money or a share to which the tenant for life will become entitled. It is a gift of a sum of 5000*l.* which in the codicil is identified by reference to a gift in the will. The testatrix in her codicil, knowing that she has given 5000*l.* absolutely to her daughter Gwendoline and wishing to settle the same sum on Gwendoline for life and on other persons after her death, has identified it by apt words. She has described it as the 5000*l.* which she has given to her daughter Gwendoline absolutely, and then gone on to direct that that sum of 5000*l.* is to be held by her trustees on trust for persons in succession. It seems to me that so soon as one reaches that conclusion as to the true meaning and effect of the codicil, the cases, such as *In re Roberts* (1) and the recent case before Eve J. of *In re Taylor* (2), really have no relevance to the words which I have to construe. The case seems to me to fall exactly within what was said by Cozens-Hardy J. in *In re Powell* (1) and by Chitty J. in *In re Pinhorne.* (2)

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(1) 30 Ch. D. 234.

(2) [1931] 2 Ch. 237.

Cozens-Hardy J. in *In re Powell* said: "Reading this will "apart from authority, I think it is pretty plain that the "testatrix intended that each of her daughters should take "a life interest, and a life interest only, in one-third of this "residuary estate. . . . . I think the testatrix has expressed "her intentions quite clearly, and has made a good disposition "of a life interest to each daughter, a life interest to each "husband, with remainder to their respective children in the "usual way, with an accruer in default of any child of a "daughter to take a vested interest. If that be the true construction of this will, the death of one of the daughters in "the lifetime of the mother has no other effect than to "accelerate the life interest of the surviving husband." And so far as the authorities went, he held that he was at liberty to come to the conclusion that "the share of this deceased "daughter has not lapsed, but was duly settled." Chitty J. in *In re Pinhorne* said (3): "I see no difficulty in interpreting, "in strict accordance with the language of the testator the "words 'the share of each of my sisters.' The fourth share "means, that which I have just now apparently given her, "but which I shew by my will I do not intend for her except "in the way hereinafter mentioned—that is to say, it is a "fourth share, to be settled on her in such a manner that "she takes a life interest only in it. The result then is, in "my opinion, that the death of Eveline in the testator's "lifetime has not displaced the settlement. Of course the "testator anticipated, as testators always do, that the object "of his bounty would survive. But in effect he has given her "a life interest; that has come to an end by her death, and "by her death no doubt in his lifetime. I think the settlement "is well effected and stands."

It is true, and I have not neglected to give what weight should be given to it, that the result is somewhat whimsical in that the testatrix has contemplated that after the death of the life tenant the reversionary interest should be taken by the persons who, on the death of her daughter, would, as the next of kin of the testatrix under the Act, have become entitled thereto. That is a factor which has been referred to in other cases as indicating that the condition of the gift is that the tenant for life should survive the testatrix. It is a factor, and has to be taken into consideration, but it is not conclusive, for after all, a testator assumes that the objects of his bounty will survive him. If they do not so survive, there may be results which he has not foreseen.

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(1) [1900] 2 Ch. 525, 528.
(2) [1894] 2 Ch. 276.
(3) [1894] 2 Ch. 276, 279.

I must declare that the legacy of 5000*l*. bequeathed by clause 6 (*c*) of the will did not lapse by reason of the death of Gwendoline in the lifetime of the testatrix but, notwithstanding her death, is held on the trusts declared concerning the same by clause 3 of the codicil to the will.

The costs of all parties as between solicitor and client must be paid out of the estate.

Solicitors: *Nash, Field & Co.; B. A. Woolf & Co.*

H. L. L.

WESTMINSTER BANK, LIMITED *v.* RESIDENTIAL PROPERTIES IMPROVEMENT COMPANY, LIMITED.

SIMONDS J.
1938
March 22, 23; April 7.

[1937. W. 4021.]

Practice—Mortgage—Foreclosure action—Debenture holders—Parties—All persons interested in equity of redemption to be made parties—R. S. C., Orders XVI., *rr.* 9, 32 (*b*) ; LV., *rr.* 5A, 5B.

In an action against a company to enforce a mortgage by foreclosure, all the holders of debentures which have been issued by the company and which rank after the mortgage, must be made parties, as persons interested in the equity of redemption. There is no provision made either by statute or any rule of Court which would enable a single debenture holder to be appointed to represent as a defendant in the action all debenture holders belonging to the same class.

Griffith v. *Pound* (1890) 45 Ch. D. 553 and *Wallace* v. *Evershed* [1899] 1 Ch. 891 followed and applied.

SUMMONS.

The plaintiffs issued this originating summons claiming foreclosure of a mortgage created by the first defendants over certain leasehold premises known as Dorset Court, Marylebone. On January 25, 1935, after the date of the mortgage, the first defendants issued a series of debentures amounting to 71,250*l.*, of which sum 50,290*l.* was outstanding when the action was commenced. These debentures were held by a number of persons, one of whom, William Charles Beasley Robinson, was made a defendant. The plaintiffs in Chambers asked that the defendant Robinson should be appointed to represent all the debenture holders of the class of which he was one, but the Master refused to make such an order, and the summons was adjourned into Court for argument on the question whether there was power to make such an order under the rules of Court, so as to bind all debenture holders of the same class. A further debenture for 14,000*l.* was created on November 26, 1935, and issued to the Royal Bank of Scotland, which was made a defendant.

Roger Turnbull for the plaintiffs. The Court is enabled, under the Rules, to appoint a single debenture holder to represent a class of debenture holders in a foreclosure action. See Order XVI., rr. 8, 9, also r. 32(*b*) and Order LV., r. 5A.

The only authority against this practice is a decision of Stirling J. in *Griffith* v. *Pound* (1) holding that it could not be done. But the practice has been altered since the date of that case. An extra paragraph has been added to Order XVI., r. 8, to enable trustees to represent beneficiaries as defendants in an action. A debenture holders' action is really a foreclosure action, and in such an action one party may represent a whole class of debenture holders.

[SIMONDS J. Here you are seeking to bind persons not before the Court who may know nothing of these proceedings.]

The Court will give notice to any persons not before the Court, just as in a debenture holders' action notice of judgment is given to every debenture holder.

Stirling J. thought that the difficulty was one confined to foreclosure actions. There appears to be no authority directly in point since *Griffith* v. *Pound* (1); but see *Fairfield Shipbuilding, &c., Co., Ld.* v. *London & East Coast Express Steamship Co., Ld.* (2) That was a foreclosure action where Kekewich J. made an order joining a debenture holder as a representative defendant.

Other somewhat analogous cases in the Weekly Notes are *In re Wilcox & Co., Ld.* (3), where Buckley J. ordered debenture holders to be joined to represent their respective classes, and *In re Cadogan & Hans Place Estate* (*No.* 2), *Ld.* (4), where an order appointing a debenture holder to represent others was dispensed with.

If one debenture holder cannot be made a representative defendant, the mortgagee may be left without a remedy, owing to the impossibility of joining all debenture holders. Since 1890 the practice of joining every person interested in an equity of redemption has been changed. There is no difference, for the purposes of practice, between a debenture holders' action and an ordinary mortgagee's action. The case is fully covered by Order XVI., r. 9.

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(1) (1890) 45 Ch. D. 553.

(2) [1895] W. N. 64.

(3) [1903] W. N. 64.

(4) [1906] W. N. 112.

[He also referred to *Francis* v. *Harrison* (1) and *Wallace* v. *Evershed*. (2)]

Cur. adv. vult.

April 7. SIMONDS J. The plaintiffs, the Westminster Bank, Ld., are first mortgagees of certain leasehold premises the property of the defendants, Residential Properties Improvement Co., Ld. On December 6, 1937, they began these proceedings by originating summons to enforce their security, joining as defendants with the mortgagor company one William Charles Beasley Robinson, whom they purported to sue "on behalf of himself "and all other holders of the debentures created by the first "defendants on January 25, 1935," and the Royal Bank of Scotland.

It appears that on January 25, 1935, the company had created a series of debentures amounting to 71,250*l*., and had issued debentures of that series, of which, at the commencement of proceedings, 50,290*l*. were outstanding; and had further, on November 26, 1935, created and issued to the defendant the Royal Bank of Scotland a debenture to secure sums not exceeding 14,000*l*. There is owing to the plaintiffs as first mortgagees the principal sum of 15,000*l*. together with some interest in arrear and mortgagees' costs.

The matter first came before me in Chambers, the plaintiffs having brought in minutes of the proposed order for which they asked. It appeared that they asked for a foreclosure order in the common form—that is, an account of what was due to the plaintiffs under their charge and for their costs of action, followed by an order that, on the defendants or any of them paying to the plaintiffs what should be certified to be due to them as therein mentioned, the plaintiffs should discharge the said charge or transfer the same as should be directed, but in default of such payments the defendants should thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in and to the said property, and the proposed order contained certain other consequential directions which I need not state.

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(1) (1889) 43 Ch. D. 183.

(2) [1899] 1 Ch. 891.

It was clear that the plaintiffs sought to foreclose all the debenture holders, of whom there were, I was told, a considerable number, without adding them as parties, and it was claimed that it was legitimate to do so on the footing that the defendant Robinson was sued as a representative of the class. The matter appeared to me to be one of considerable importance, and I accordingly adjourned it into Court for further argument.

On the matter coming before me in Court Mr. Turnbull urged on behalf of the plaintiffs that he was entitled to the proposed order, and that *Griffith* v. *Pound* (1) could no longer be regarded as good law. In that case, in which mortgagees were seeking to foreclose their security and two only out of a large number of debenture holders, who were subsequent incumbrancers, had been added as defendants to represent the other debenture holders, Stirling J. declined to make an order for foreclosure, holding that such an order could not be made in an action so constituted but that all persons interested in the equity of redemption must, if they were to be bound by the order, be added as parties to the action.

In my judgment, the decision of Stirling J. governs this case. In that case, as in this, the plaintiffs sought to rely on Order XVI., r. 9, which has not been altered. That rule was considered by the learned judge in conjunction with Order LV., rr. 5A and 5B, which also have remained unaltered so far as they are material to the present case. It appears to me that his judgment is conclusive as an authority on the point before me. Nor, as I think, is there any valid reason for questioning it on principle or on some supposed change in the practice of the Court.

The right of all persons interested in the equity of redemption to redeem the mortgaged property has always been jealously guarded by the Court, and it would not be in accordance with principle by means of a representation action to foreclose subsequent incumbrancers in their absence and, it might well be, without their knowledge. Nor do I find any justification for the suggestion that the practice of the Court has changed. No case has been cited to me in which the authority of *Griffith* v. *Pound* has been questioned. On the other hand, the practice there laid down was followed in *Wallace* v. *Evershed* (1), where Cozens-Hardy J. held that all the debenture holders were rightly added as defendants to an action in which first mortgagees were claiming foreclosure.

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(1) 45 Ch. D. 553.

I was referred to Order XVI., r. 32 (*b*), as supporting the view that I might here make a representation order; but, if r. 9 does not assist the plaintiffs, I do not see how r. 32 (*b*) can. I doubt whether the language of the rule is apt to cover such a case, but in any event I should decline in the exercise of my discretion to make an order under it.

It was urged on me that the result is to deprive a mortgagee of the property of a company, which has issued debentures to a large number of persons, of a substantial part of a mortgagee's usual rights. For, if a mortgagee cannot obtain an order for foreclosure unless he has made all subsequent incumbrancers parties to the action, so also he cannot obtain an order for sale without making them parties. Sect. 91 of the Law of Property Act, 1925, enables an order for sale to be made in a variety of circumstances, including the case of a mortgagee or any person interested in the mortgage money or in the right of redemption not appearing, but does not appear to cover the case where subsequent incumbrancers have not been made parties.

Again, special provision has been made by Order LI., r. 1 B, for sales in debenture holders' actions, whether before or after judgment, before all persons interested are ascertained, whether served or not, and it would seem that this rule has been widely interpreted so as to enable actions to be begun, judgments made, and orders for sale obtained in the presence of representatives only of a number of debenture holders. But that no departure from the general principle is intended seems clear from the directions, given on May 12, 1909, by the Chancery Judges, which are set out on p. 2631 of the Annual Practice, 1938, and are as follows:

"In a debenture holders' action where the usual "judgment has been made, prior and subsequent incum-"brancers ought not to be served with notice of the

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(1) [1899] 1 Ch. 891.

"judgment under Order XVI., r. 40; subsequent incumbrancers "should be added as parties under Order XVI., r. 11; "and where a sale is directed with the consent of prior "incumbrancers—i.e., in the form used in the case of creditor's "action for sale of real estates—informal notice with a view "to obtaining such consent may be given."

No provision has been made by statute or by rule for the case of an action by a mortgagee where there are numerous subsequent incumbrancers. I agree, then, that the result may be at least highly inconvenient to a mortgagee of the property of a company, but it is an inconvenience which is not to be escaped. It was, after all, only at a recent date that a rule was made which obviated the necessity of making not only trustee mortgagors but their beneficiaries also parties to a foreclosure suit. I see nothing anomalous in a situation which places mortgagees seeking foreclosure in a position of some embarrassment. If they are not content to exercise their right at law to go into possession or their statutory right of sale out of Court, but seek the aid of the Court to enforce their rights, they must bring before the Court all persons who are interested in the equity of redemption, except that they are now (see Order XVI., r. 8) absolved from the necessity of joining not only trustees, executors and administrators, but also persons beneficially interested in the trust and estate. The task may be an onerous one, but it is by no means impossible of performance in such a case as this.

The summons will stand over generally with liberty to amend and to apply to restore.

Solicitors: *Norton, Rose, Greenwell & Co.*

H. L. L.

In re A DEBTOR.

[No. 18 of 1937.]

FARWELL
AND
MORTON
JJ.

1938
May 16.

Bankruptcy—Debt arising out of moneylending transactions—Petition by moneylender—One loan—Two promissory notes as security—Memorandum signed by borrower describing security as "a promissory "note"—Memorandum to "contain all the terms of the contract"—Bankruptcy Rules, 1915, *r.* 168 (*a*)—*Moneylenders Act,* 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-s.* 2; *s.* 9, *sub-s.* 2.

By r. 168 (*a*) of the Bankruptcy Rules, 1915 (being r. 2 of the Bankruptcy Rules [No. 2], 1931, which came into operation on January 1, 1932), a petitioning creditor being a moneylender must, at the hearing of the petition, prove his debt by an affidavit including a statement detailing the particulars required by s. 9, sub-s. 2, of the Moneylenders Act, 1927. Those particulars are: the amounts of the sums lent, the dates on which they were lent, the amount of every payment already received by the moneylender in respect of the loan and the date on which every such payment was made, and the amount of the balance remaining unpaid, distinguishing principal from interest, and, where the interest included in the unpaid balance represents a yearly rate above five per cent., what the interest so included would be if it were calculated at five per cent.

By s. 6, sub-s. 1, of the Act, no contract that a borrower shall repay money lent to him by a moneylender or security in respect of such a contract shall be enforceable, unless the borrower personally signs a written note or memorandum of the contract and receives a copy of that note or memorandum within seven days of the contract's date: and by sub-s. 2 the note or memorandum must contain all the terms of the contract.

A moneylender lent to a borrower 100*l.* as one loan, taking as security two promissory notes for 50*l.* each, exactly alike in date and wording. The memorandum of the transaction signed by the borrower described the security as "a promissory note." The moneylender obtained judgment against the borrower, on whose non-compliance with a bankruptcy notice he presented a petition in the county court. The registrar made a receiving order, against which the borrower appealed:—

Held, by the Divisional Court in Bankruptcy, allowing the appeal, that the misdescription of the security as "a promissory "note" instead of "two promissory notes" was an error which prevented the memorandum from complying with the Act.

APPEAL from county court registrar.

This was an appeal by a debtor from a receiving order made by the registrar of Guildford County Court. The petitioning creditor was a registered moneylender and the debt was incurred as the result of moneylending transactions between the petitioning creditor and the debtor.

The ground of the appeal was that the written memorandum, signed by the borrower, of the contract to repay the money lent and to pay interest on it, did not contain, as required by s. 6, sub-s. 2, of the Moneylenders Act, 1927, "all the "terms of the contract," and that there was therefore no compliance with s. 9, sub-s. 2, of the Act, or with r. 168 (*a*) of the Bankruptcy Rules.

On October 23, 1936, the creditor lent the debtor 100*l.* and he took as security for that amount two promissory notes, both dated October 23, 1936, and in exactly similar terms. The form of the promissory notes was a promise "to pay" (the creditor) "or order at" (the creditor's address) "the sum of 50*l.* together with interest thereon at the rate "of 48 per cent. per annum by the following instalments, "5*l.* on January 1, 1937, and 5*l.* on the 1st of each succeeding "month, such instalments to include both principal and "interest. In case of default in payment of any instalment "or part thereof, the whole remaining balance of the said "principal of fifty pounds then outstanding, together with "due interest at the rate aforesaid to date of default, shall "immediately become due and payable, and such balance of "principal and interest shall carry simple interest from the "date of such default until payment at the aforesaid rate of "48*l.* per cent. per annum."

At the same time the debtor signed a memorandum of contract in the following form:—

"Memorandum of Contract for a proposed advance to be "made on the 23rd day of October 1936 to" (the debtor) "of" (the debtor's address) "by you of the sum of one hundred "pounds with interest at the rate of forty-eight per cent. "per annum on the security of a promissory note payable to" (the creditor) "of" (the creditor's address) "by consecutive "monthly instalments of 10*l.* each commencing on the first "day of January, 1937.

"In the event of default in payment of any instalment or "part thereof, the whole balance of principal then remaining "unpaid together with interest at the rate aforesaid to the "date of default shall immediately become due and payable "and such balance of principal and interest so remaining due "as aforesaid shall carry simple interest from the date of "such default until payment at the rate of 48 per cent. per "annum." That was signed by the debtor, and followed by the words "I hereby acknowledge to have received each a "copy (*sic*) of the above memorandum and confirm that it "was signed before the money was advanced or the "above-mentioned promissory note was given. I also agree "that the above rate of interest is a fair rate for the risk "taken and that I am satisfied with the terms of this "transaction." That acknowledgment also was signed by the debtor.

On the two promissory notes only one payment was made, and on September 10, 1937, the creditor obtained judgment for 87*l.* 10*s.* 2*d.* On October 20, 1937, a bankruptcy notice was served. It was not complied with, and on November 15, 1937, the petition was presented. That stated where the debtor was residing, and that he was justly and truly indebted to the creditor in the sum of 87*l.* 10*s.* 2*d.* debt and costs in a judgment obtained by the creditor on the 10th day of September, 1937, against the debtor for money lent and interest thereon and was in the common form. The matter came before the registrar on December 9, 1937, and was adjourned. Meanwhile, the creditor made an application to the registrar for leave to amend the petition, but leave was refused, and that order was not appealed against. The creditor put in an affidavit, sworn on March 10, 1938, in which he explained why there were two promissory notes; he stated that when the debtor asked for the advance: "I did "not have a 100*l.* bill available, but having two 50*l.* bills "I made use of them. The matter was one transaction, "viz.:—an advance of 100*l.*, and the only reason why there "were two bills was as above stated. I had no other alter-"native, as bills have to be stamped before they are signed."

The position therefore was that there was only one loan secured by two promissory notes. In the affidavit verifying the amount of the loan the actual amount said to be due was 79*l.* 13*s.* 11*d.*

On April 5, 1938, the receiving order was made, and this appeal was from that order.

J. Basil Blagden and *Douglas C. L. Potter* for the debtor as appellant. Nowhere in the petition does it appear that the loan was from a registered moneylender; but in the course of the proceedings it did appear, and there is no sort of attempt to comply with the rules. Later there was an attempt, when it emerged during the proceedings that the petitioning creditor was a moneylender, and the Court's power to go behind the transaction became a duty.

The registrar was wrong in coming to the conclusion that the memorandum at which he looked was a sufficient compliance with the Act. [They referred to s. 6, sub-s. 1, and s. 9, sub-ss. 1 and 2, of the Moneylenders Act, 1927.] If the date of the loan is wrongly stated, the contract is unenforceable. [They referred to the judgment of Greer L.J. in *Reading Trust, Ld.* v. *Spero* (1) and to *Long* v. *Millar.* (2)]

The first case in which an obvious inaccuracy was held not to be fatal was *Sherwood* v. *Deeley and Wife.* (3) The case of *Temperance Loan Fund, Ld.* v. *Rose* (4) laid the ghost of the clerical error, and shows quite clearly that the doctrine of the clerical error has no substance in fact: see the judgments of Scrutton and Slesser L.JJ. *Parkfield Trust, Ld.* v. *Curtis* (5) shows the sort of error that appears at first view to be quite trifling and has been held to be vital: see also the judgment of Scrutton L.J. in *Lancashire Loans, Ld.* v. *Black.* (6) The principles in those cases were acted on in *Mason & Wood, Ld.* v. *Greene.* (7) It was exactly the same point. The memorandum failed to state whether the rate of interest was actual or notional: see also *Simmons* v. *Russell Financiers, Ld.* (8), and *Dunn Trust, Ld.* v. *Feetham* (9), a case of a clerical error if ever there was one.

(1) [1930] 1 K. B. 492, 507.
(2) (1879) 4 C. P. D. 450.
(3) (1931) 47 Times L. R. 419.
(4) [1932] 2 K. B. 522, 526, 532.
(5) [1934] 1 K. B. 685.
(6) [1934] 1 K. B. 380, 406.
(7) [1936] 2 K. B. 370.
(8) [1934] 2 K. B. 487.
(9) [1936] 1 K. B. 22.

The question what is and what is not a sufficient memorandum was considered in *Mitchener* v. *Equitable Investment Co.* (1) That was a very strong case indeed, as the point was that, although a man is deemed to know the law and will therefore know, on seeing a memorandum stating that a loan to him by a moneylender is secured by a bill of sale which he, as borrower, has given on personal chattels, that only the powers of seizure under s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, can be incorporated in the contract, nevertheless s. 6 of the Moneylenders Act, 1927, will be infringed if the memorandum does not specify exactly which of those powers are incorporated in it.

The first question in the present case is, is the discrepancy material? Any discrepancy is material if what is omitted or inserted might increase the burden on the borrower, as might happen in the present case. The proper course for a moneylender to take when he issues his bankruptcy notice is to follow his judgment: *In re A Debtor.* (2) See also the observations of Lord Hanworth M.R. in *In re A Debtor.* (3) The question there was whether an admission that the requirements of s. 5, sub-s. 2, of the Bankruptcy Act, 1914, r. 171 of the Bankruptcy Rules, and s. 10 of the Moneylenders Act, 1927, have been complied with is sufficient: and the Court held that it is not. Once the Court has decided that it will look behind the moneylender's judgment, it must consider whether the memorandum is sufficient or not: and if it finds that it is not, it must dismiss the petition.

H. O. O'Hagan for the creditor as respondent. Here there is a complete misapprehension as to the position where a moneylender is concerned. The petition need not state anything other than what is stated in any petition. What has to be done is to make sure that the affidavit contains certain statutory particulars. In the present case, the registrar told the petitioning creditor's solicitors that the petition was wrong, and they presented an amended petition: but they need not have done so; all that is necessary is that an affidavit containing all the statutory particulars must be filed.

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(1) (1938) 54 Times L. R. 334; 158 L. T. 176.

(2) [1930] 2 Ch. 239.

(3) [1935] Ch. 353, 357.

An affidavit was sworn, dated March 2, 1937, before the hearing of the petition, and it complies with all statutory requirements. It is the affidavit, not the petition, that is required to contain the information, and the affidavit in the present case did contain it: see s. 9, sub-ss. 1 and 2, of the Moneylenders Act, 1927. The learned registrar was therefore mistaken in saying that there was anything wrong with the form of the petition.

As to the effect of two promissory notes, the question seems to be in a very small compass. It is not whether the error is clerical, but whether it is trivial. The answer is that it is trivial, because it is not correct to say that the result of giving two promissory notes is that they could be endorsed to two different persons, and the debt thus be severed, because they are security for the debt and must both together be assigned with it. The creditor cannot assign part of the debt: therefore, the only effect of purporting so to assign it would be to give the assignee an equitable right: see *In re Steel Wing Co.* (1), in which *Skipper & Tucker* v. *Holloway & Howard* (2) was not followed. *Williams* v. *Atlantic Assurance Co.* (3) was a rather complicated case of a marine insurance policy, in which Greer L.J. expressed the view that the assignee of part of a debt was merely an equitable assignee.

Even were there, in the present case, but one promissory note, still the debtor might, in some circumstances, be in the danger of which he now complains, for the creditor might assign the whole debt, with both notes or the one note if there were only one, to several assignees, all of whom would be co-promisees: *Cullen* v. *Knowles.* (4) Looking at the matter generally, there is no probability of the debtor's being in any worse position from there having been signed two promissory notes instead of one.

J. Basil Blagden and *Douglas C. L. Potter* in reply. The argument that the error is trivial proceeds upon the fallacy of ignoring the words "or order" on the promissory notes and ignoring also ss. 8 and 9 of the Bills of Sale Act (1878) Amendment Act, 1882, which provide that a bill of sale shall be void unless it is attested and registered and sets forth the consideration for which it was given and unless it is made in accordance with the form in the Schedule to the Act. Also, it is not very likely that the petitioning creditor in the present case would endorse one of the promissory notes to his butler and the other to his cook: but he might; and immediately that happens there is the possibility of two actions, because there are two negotiable instruments.

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(1) [1921] 1 Ch. 349.

(2) [1910] 2 K. B. 630.

(3) [1933] 1 K. B. 81, 100.

(4) [1898] 2 Q. B. 380.

FARWELL J. [after stating the facts substantially as set out above:] There is only one question in this case, and that arises in this way. In order to comply with s. 9 of the Moneylenders Act, 1927, and with r. 168 (*a*) of the Bankruptcy Rules, before a receiving order can be made in such a case as this there must be produced to the Court a memorandum which complies with s. 6, sub-s. 2, of the Act, i.e., one which contains all the terms of the contract.

It is said that the memorandum in this case does not comply with that sub-section because it states that the security for the loan is one promissory note and, in truth and in fact, there were two promissory notes for 50*l.* each, and that therefore the statement does not comply with the Act, because it does not contain all the terms of the contract. On the other hand it is said that that is such a trivial error in the memorandum as will not prevent it being a compliance with the Act. A large number of authorities have been referred to, the effect of which in my judgment is that an error in a memorandum will not necessarily invalidate it or make it a non-compliance with the Act if it is of such a trivial nature that it does not affect the true obligation or position of the borrower. On the other hand, the provision in the Act for a memorandum was intended for the debtor's protection, to enable him to know exactly what the terms of the loan were: and if the memorandum does not disclose the true terms so that the debtor is in any way prejudiced, then the memorandum is insufficient. If, however, notwithstanding the error, the true terms of the contract can be readily understood from the memorandum, then the error is not sufficient to invalidate it, and the only question here is, is this failure to state the true facts sufficiently serious to prevent the memorandum from being a compliance with the Act? No doubt the debtor, when he signed the memorandum, was well aware that there were two promissory notes; but, none the less, the memorandum does not state the whole terms of the contract: can then the error be treated as immaterial?

It is said that really the debtor's position is none the worse whether the words "a promissory note" or the words "two "promissory notes" be used. I cannot accept that contention. It is plain that each promissory note could have been endorsed and made over for value to different persons, either or both of whom would have been in a position to sue the debtor, and the debtor's position was therefore less favourable than it would have been had the transaction been what it was stated to be in the memorandum. In my judgment therefore the memorandum is not a compliance with the Act, and the learned registrar ought to have dismissed the petition, and this appeal will be allowed.

MORTON J. I agree.

Solicitors: *Isadore Goldman & Son; Barnes & Butler, for John Lewenstein, Hull.*

K. R. A. H.

TALLENT *v.* COLDWELL.

FARWELL J.

1938
March 8.

[1938. T. 193.]

Copyright—Action for infringement—Claims for damages for infringement, damages for detention and damages for conversion—Denial of liability—Payment into Court by defendant of one sum of money in respect of whole action, without specifying cause of action—R. S. C., Order XXII., *r.* 1, *sub-rr.* 1 *and* 2.

Where in an action for infringement of copyright the plaintiff claims damages for infringement, damages for detention and damages for conversion, the defendant can, under Order XXII., r. 1, sub-rr. 1 and 2, pay into Court, with denial of liability, one sum of money in respect of the whole action, without specifying the cause of action.

PROCEDURE SUMMONS.

The plaintiff was the author of a literary work entitled "Secrets of Cutting; Ladies' Garments," and he was the owner of the copyright therein. The defendants, Tailor and Cutter, Ld., were the printers and publishers of a periodical publication called "Women's Wear." In its publication dated October 15, 1937, "Women's Wear" published an article entitled "D. B. Panel," and in its publication of October 22, 1937, it published another article entitled "Draft of Ladies' "Coat." The defendant Coldwell was the author of both articles. The plaintiff claimed that both articles were an infringement of his copyright, and he commenced an action claiming damages for infringement of copyright, damages for detention and damages for conversion. The defendants denied liability. The statement of claim and the defence having been delivered, the defendants, Tailor and Cutter, Ld., took out this summons asking for an order that they "be at liberty, pursuant to "Order XXII., r. 1, sub-rr. 1 and 2, of the Rules of the Supreme "Court, to make a general payment into Court of a single sum "of money in satisfaction of the plaintiff's claim for damages, "without specifying the cause or causes of action in respect of "which such payment is made." Order XXII., r. 1, sub-r. 1, provides that "In any action for a debt or damages or in an "Admiralty action the defendant may at any time upon notice "to the plaintiff pay into Court a sum of money in satisfaction "of one or more of the causes of action . . . .": and sub-r. 2 provides that: "Where the money is paid into Court in "satisfaction of one or more of several causes of action the "notice shall specify the cause or causes of action in respect "of which payment is made and the sum paid in respect of "each such cause of action unless the Court or Judge otherwise "order."

Macgillivray for the applicants. This is an action for infringement of copyright, in which the plaintiff claims damages for infringement and damages for conversion. The Court of Appeal has said that these are two separate causes of action, and the remedies are cumulative, though the claims are so co-related that the damages cannot be assessed separately: see *Sutherland Publishing Co.* v. *Caxton Publishing Co.* (1) The remedies for the two causes of action are given by s. 6, sub-s. 1, and s. 7 of the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46). If the defendants attempted to allocate, the tribunal might assess differently. It is not right that the defendants should be put to guessing. If they are compelled to allocate, the plaintiff may take out the money and go on with the other cause of action. This is one of the cases in which the defendants ought to be allowed the benefit given to them by the rule.

Ker Lindsay for the plaintiff in the action. The rule only came into force in 1933. Where there is more than one cause of action, the Courts have always been against allowing the defendant to pay into Court one lump sum in respect of the whole action: *Weber* v. *Birkett.* (2) It is clear that up to 1933 the Courts have always leaned against such a payment. Even now it is only in an exceptionally strong case that the Court will allow a defendant to take advantage of the new rule. In this case the defendants need not be embarrassed in deciding how to specify the amount they are paying in in respect of each cause of action.

Sir Wilfrid Greene M.R. in *Sutherland Publishing Co.* v.

(1) [1936] Ch. 323.

(2) [1925] 2 K. B. 152.

Caxton Publishing Co. (1) shows the distinction drawn by the Court of Appeal, and the principles on which assessments should be made are stated by MacKinnon L.J. (2) The rule contemplates such a case as the present, but it does not specify the principles on which the Court is to act.

Macgillivray in reply. It was *Weber* v. *Birkett* (3) that led to the passing of the present rule. This is a very much stronger case, because the various causes of action arise from one and the same cause.

FARWELL J. The action is a copyright action. The plaintiff, who is the author of a literary work, "Secrets of "Cutting; Ladies' Garments," and the owner of the copyright therein, sues the defendants, Mr. Coldwell and Tailor and Cutter, Ld., for infringement of his copyright by taking certain portions of his literary work and reproducing them in a publication for which the second defendants are responsible. The plaintiff accordingly claims damages for infringement of copyright, damages for detention and damages for conversion. The defendants deny that there has been any infringement, and that is the issue in the case. The statement of claim and defence having been delivered, the defendants took out a summons, which came before the Master, dated February 21, 1938, in which they asked for certain relief, to which, with the exception of para. 2, I need not refer. With regard to that paragraph the summons was adjourned into Court to be dealt with as a procedure summons. In para. 2 of the summons the applicants ask that they may be at liberty in pursuance of Order XXII., r. 1, sub-rr. 1 and 2, of the Rules of the Supreme Court, to pay into Court a lump sum of money in satisfaction of the plaintiff's claim for damages, without specifying the cause or causes of action in respect of which such payment is made. I have to consider whether this is a case in which the defendant should be permitted to take that somewhat exceptional course, or whether the case does come within the general rule that if there are separate causes of action, and it is desired to pay money into Court in satisfaction of the claim, the money must be allocated to the various causes of action, and a lump sum cannot be paid in satisfaction of the whole of the claim. Order XXII., r. 1, sub-rr. 1 and 2, provides that [his Lordship read Order XXII., r. 1, sub-rr. 1 and 2, and continued :] Apart from that sub-rule, where there are separate causes of action, a defendant cannot pay in a lump sum in respect of all the damage alleged to have been suffered.

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(1) Ante, pp. 174, 189.
(2) Ante, pp. 174, 195.
(3) [1925] 2 K. B. 152.

If authority is required for that proposition, it is to be found in the case that was cited, of *Weber* v. *Birkett.* (1) That was a case of a slander and a libel, and the jury returned a verdict for a lump sum of 200*l.*, refusing to discriminate between the two causes of action. In their view 200*l.* was the damage which the plaintiff had suffered, and they were unable to differentiate between them. The defendant had, in the first instance, paid into Court 105*l.* in satisfaction of both the slander and the libel. In the statement of facts it appeared that : "On being required by the plaintiff to specify how "much of that sum was paid in respect of the slander, and "how much in respect of the libel, he amended his defence by "paying in another sum of 105*l.*, and allocating 105*l.* to each "cause of action." On the jury's finding each party asked for judgment. Lord Hewart C.J. held that as the causes of action were distinct the verdict was bad, and he declined to enter judgment for either party. After the jury were discharged the defendant asked leave to amend his pleading by alleging that the money was paid in generally in satisfaction of both causes of action. That application was refused and the matter went to the Court of Appeal. It is quite plain from the judgment in that case that the Court held that no leave to amend should be given for the reason that the plea when so amended would be a bad plea, because it was not open to a defendant in such circumstances to pay in a lump sum in respect of different causes of action. After that decision the rule was altered, and it is open to the Court under the present rules to permit a defendant to pay in a lump sum

(1) [1925] 2 K. B. 152.

without specifying the several causes of action for which the money is paid, but in my judgment such permission should only be given in exceptional cases. So far as the researches of counsel go, there does not appear to be a reported case in which the Court has permitted the rule to be taken advantage of. It is said by counsel for the plaintiff, although he admits, as he must, that the Court undoubtedly has power by this rule to permit it to be done, that this is not such a case as would justify the Court in making the order sought. It would require, he says, a very much stronger case than this to entitle a defendant to take the course which the defendants seek to take in this case. I have to consider in dealing with this matter what are the causes of action. What has given rise to the whole of the dispute is the alleged infringement of copyright. If there has been none, then cadit quaestio ; but assuming that there has been infringement of copyright, then the plaintiff is entitled to his remedy in damages on different grounds. He is entitled, apart from any question of an injunction or delivery up, to damages for infringement, and he may also be entitled to damages for conversion and for detention, and these are undoubtedly separate causes of action.

If there was any doubt as to that, it has been set aside by a decision of the Court of Appeal in *Sutherland Publishing Co.* v. *Caxton Publishing Co.* (1) That case was heard by myself, and the matter came before the Court on a question of law—namely, whether a claim for damages for conversion and a claim for damages for infringement were alternative so that the plaintiff had to elect which he would take, or whether they were cumulative. The view which I took was, that they were alternative pleas, and if the plaintiff elected to recover damages for infringement he could not also recover damages for conversion. That decision was reversed. The Court of Appeal came to the conclusion that the remedies were cumulative, and therefore that damages on both heads could be recovered. I do not think it was doubted in that case, by myself or any one else, that there were separate causes of action in respect of infringement and conversion. The only question was whether

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(1) [1936] Ch. 323.

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they were alternative or cumulative. At any rate the Court of Appeal made it quite plain that they were separate causes of action, although the whole of the trouble arose out of one tort, namely infringement. Therefore prima facie this is not a case in which the defendants ought to be permitted to do that which they seek to do. Prima facie they are bound to discriminate if they desire to pay money into Court between the various causes of action and to specify the amount paid in in respect of each of the separate claims. But there are rather special circumstances arising in such a case as this. As I have already said the cause of the whole trouble is a single cause, namely infringement, and when it comes to assessing damages on the various causes of action, namely, the infringement, the detention and the conversion, it is quite plain, as the Court of Appeal pointed out, that there must almost always be a certain amount of overlapping. That seems to me to differentiate this case from most other cases in which damages are claimed for different causes of action, and to justify me in giving the defendants permission to do that which they seek to do. The defendants will be put in a position of some embarrassment in considering the amount they should pay into Court if they have to assess to the best of their ability the amount which they ought to pay in in respect of the various causes of action. It might well be that, if they paid in with a denial of liability a sum of money in respect of the infringement and another sum of money in respect of conversion, the plaintiff might take out the sum paid in in respect of infringement and still pursue his remedy for conversion, and at the trial of the action might fail to prove infringement, in which case he would never have been entitled to recover any damages at all, although he would in fact have in his pocket the amount paid in in respect of infringement.

On the whole I think that this is one of the few cases to which this rule was intended to apply. I think that I ought in a case of this kind, where without the relief which the defendants seek they would be put in a position of some embarrassment, to permit them to do that which they seek to do, that is to say, pay into Court a sum of money with a denial of liability,

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which they say is sufficient to compensate the plaintiff for any damage which he has suffered under any head upon which damages are claimed. Then it will be for the plaintiff to consider whether the sum taken as a whole is sufficient compensation. If he thinks it is not, he can then pursue his remedy and fight the action. On the other hand, if he thinks it is sufficient to compensate him, he will take the money out of Court and the action as a whole will be at an end. In those circumstances I propose to permit the defendants to do that which they seek to do—namely, pay into Court with a denial of liability a single sum of money in satisfaction of the plaintiff's whole claim, without specifying the separate causes of action in respect of which such payment in is made.

The costs of this summons will be costs in the action.

Solicitors for applicants: *Dawson & Co.*
Solicitors for plaintiff in the action: *Davenport & Co.*

P. J. B.

BENNETT J.

1938

March 10, 11, 12; April 12.

In re CLEADON TRUST, LIMITED.

[00213 of 1937.]

Company—Advances by director to subsidiary companies for benefit of company—Advances made at request of secretary—Borrowing not authorized by effective resolution of directors.

One of the directors of a company advanced money at the request of the secretary and for the benefit of the company to two subsidiary companies. The secretary was also the secretary of the subsidiary companies. At a meeting of the directors of the company, at which there was no independent quorum, the company purported to confirm some of the advances as having been made for its benefit and they were so treated in the books of the company. The company subsequently went into voluntary liquidation:—

Held, that the director was not entitled to recover the money so advanced. The secretary had no power to borrow on behalf of the company and the company could not be held liable to repay money paid for its benefit at the request of its secretary; the request not having been made or confirmed by a properly constituted meeting of the directors, the company did not know of and acquiesce in the payments being made for its benefit.

SUMMONS.

A summons was issued in the winding up of Cleadon Trust, Ld. (hereinafter called "the company"), against the liquidator of the company, in which the applicant (a Mr. Creighton) sought the following relief, namely:—"That the decision of "the liquidator in respect of the applicant's proof of "53,361*l.* 14*s.* 11*d.* whereby he rejected such proof to the "extent of 18,254*l.* 7*s.* 3*d.* may be reversed or varied "and that the said proof may be allowed in full."

The company was incorporated on April 29, 1925, under the Companies Acts, 1908–1917, as a public company limited by shares with a nominal capital of 60,000*l.* divided into 60,000 shares of 1*l.* each. The issued capital was 51,847 shares, all fully paid. Of these the applicant was registered as the holder of 27,417 shares, a Mr. Kelly held 4477 shares, and the balance of 19,953 shares was distributed amongst 61 other holders. There were at one time two directors, the applicant and a Mr. William Jackson, who ceased to be a director on August 6, 1931. On that day Mr. Kelly was appointed a director and from then until the liquidation he and the applicant were the only directors of the company. The secretary of the company was a Mr. Antrobus. The business of the company was that of an investment trust and guarantee company, and consisted for the most part of lending money for the construction of houses, flats, and other buildings.

The articles of association contained the following provisions :—

Art. 99 : "Until otherwise determined by a general meeting, "the number of directors shall not be less than two nor more "than six."

Art. 110 : "The business of the company shall be managed "by the directors, who may pay all such expenses of and "preliminary and incidental to the promotion, formation, "establishment and registration of the company as they think "fit, and may exercise all such powers of the company "(including the powers expressly mentioned in clause 3 of the "Memorandum of Association of the company), and do on "behalf of the company all such acts as may be exercised and "done by the company and as are not by the statutes or by "these Articles required to be exercised or done by the "company in General Meeting."

Art. 116 : "A director may contract with and be interested "in any contract or arrangement made with the company "either as vendor, purchaser or otherwise, and shall not be "liable to account for any profit made by him by reason of "any such contract or arrangement, provided that the nature "of the interest of the director in such contract or arrangement "be declared to the Board before the same is entered into or "in any case at the first meeting of the directors after the "acquisition of his interest ; but no director shall vote as a "director in respect of any contract or arrangement in which "he shall be interested, and if he do so vote his vote shall not "be counted ; but this provision shall not apply to any "arrangement for giving a director security for advances or "by way of indemnity or to any allotment of shares or debentures of the company, and it shall not prejudice or affect "the agreement mentioned in Article 3 hereof or any matter "connected therewith."

Art. 124: "The directors or any committee of directors "may meet together for the despatch of business, adjourn and "otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. "Until otherwise determined two shall be a quorum."

The applicant from time to time made advances amounting in all to 17,353*l.* 7*s.* 11*d.* to Carlisle (Builders), Ld. (hereinafter called "Carlisles") and to Property and Building Corporation, Ld. (hereinafter called "P.B.C."), which were subsidiary companies of the company. At the relevant dates the directors both of Carlisles and P.B.C. were the same persons as the directors of the company, and Mr. Antrobus was the secretary of both these companies.

All the payments were made by the applicant at the request of Mr. Antrobus to enable either Carlisles or P.B.C. to make payments due by them. The applicant made the payments upon the footing that they should be treated as loans made by him to the company, and they were so treated, all the payments being placed to his credit in his loan account in the company's ledger. Corresponding entries to the debit of Carlisles and P.B.C. respectively were at the same time made in the accounts of those companies in the company's ledger. Mr. Antrobus had no authority to borrow on behalf of the company, and all the transactions took place without the sanction of a resolution of the Board of the company.

At a Board Meeting of the company held on December 5, 1932, at which the directors present were the applicant and Mr. Kelly, the following resolution was passed: "It "was resolved that the several advances to the Property "& Building Corporation Limited made by R. Creighton "between 29th July, 1931, and the 12th December, 1931, "amounting to 13,875*l.* which were made at the request "of the Cleadon Trust Limited be confirmed."

In the annual balance-sheets submitted to the company in general meeting and adopted by the company, the sums paid by the applicant to Carlisles and P.B.C. were included in the item of sundry creditors on the debit side of the accounts. There was nothing in the accounts to indicate to the shareholders that the applicant was a creditor; the shareholders were never told the facts relating to the advances made by the applicant for which he now claims to prove, nor were the shareholders ever asked to pass, nor did they pass, any resolution recognizing the fact that the applicant was a creditor in respect of the sums in question.

The company was the holder of debentures covering all the assets of Carlisles and P.B.C. respectively. It was admitted that the company benefited by the payments which the applicant made and in respect of which he claimed to be entitled to prove.

The liquidation of the company, which was a members' voluntary liquidation, began on February 6, 1935.

The applicant made his proof on November 13 for the sum of 53,361*l.* 14*s.* 11*d.* for money lent and interest thereon at the rate of 2 per cent. per annum. Notice of rejection of the proof to the extent of 18,254*l.* 7*s.* 3*d.* was given on June 8, 1937. In the notice the grounds of rejection were stated in the following terms: "I reject your proof to the "extent of 18,254*l.* 7*s.* 3*d.* This sum is made up as follows: "(*a*) 17,353*l.* 7*s.* 11*d.* of the sum claimed by you represents "sums advanced from time to time by you to, or paid by "you on behalf of Carlisle (Builders) Limited and Property "and Building Corporation, Limited, and which were in your "account with the company, without any authority, treated "as advanced to the company; in order apparently to place "the matter partly in order, a resolution was passed at a "directors' meeting held on the 5th December 1932 under "which the Board resolved that advances made by you to "the said Property and Building Corporation Limited between "July and December 1931, amounting to 13,875*l.*, should be "assumed by the company. The only directors present "were you and Mr. Kelly. The quorum for directors' meetings "is two. Under Article 116 of the company's Articles "of Association you were precluded from voting upon the said "resolution of the Board which was therefore invalid and "not binding. (*b*) 900*l*. 19*s*. 4*d*. represents interest wrongly "paid or credited to you in respect of the said sum of "17,353*l*. 7*s*. 11*d*. Particulars of the items making up the "said sum of 17,353*l*. 7*s*. 11*d*. are annexed hereto."

The principal sum of 17,353*l*. 7*s*. 11*d*., for which the applicant claimed the right to prove, was made up of thirteen separate items. The company itself did not receive any cash in respect of the sums for which the applicant claimed to prove.

F. R. Evershed K.C. and *Roger Turnbull* for the applicant. The question is whether it can be said that there is an obligation on the head company to make these payments to the subsidiary companies. It is clear that there is an equity which gives rise to the applicant's cause of action: see Leake on Contracts, 8th ed., pp. 32 and 44; see also *Lewis* v. *Campbell* (1); *Falcke* v. *Scottish Imperial Insurance Co.* (2); and Smith's Leading Cases, 13th ed., pp. 155, 156 and 159.

The company knew what the applicant was doing and that he was doing it with the expectation of being paid. Inasmuch as the director has made, as recorded in the resolutions, payments on behalf of the company, he is entitled to an indemnity. In this case the company clearly had power to borrow.

In *Ex parte Chippendale* (3) the directors advanced money with no authority from the company.

[They also referred to *Sinclair* v. *Brougham* (4) and *Irvine* v. *Union Bank of Australia.* (5)]

Lionel Cohen K.C. and *K. W. Mackinnon* for the respondent. The question is whether the applicant communicated to any one his intention to be repaid by the head company. He would be entitled to succeed if he had communicated to the company his intention to be repaid and if that intention had been acquiesced in by the company.

(1) (1849) 8 C. B. 541, 544.
(2) (1886) 34 Ch. D. 234.
(3) (1853) 4 De G. M. & G. 19.
(4) [1914] A. C. 398.
(5) (1877) 2 App. Cas. 366, 375.

[They referred to *Reversion Fund and Insurance Co., Ld.* v. *Maison Cosway, Ld.* (1), and *Sinclair* v. *Brougham.* (2)]

The knowledge of the secretary is not the knowledge of the company: *Falcke* v. *Scottish Imperial Insurance Co.* (3)

The applicant, being a director, cannot rely on the knowledge of the secretary. In this case it is quite clear that the shareholders did not know of the transaction. Without their knowledge there can be no acquiescence. There is no authority for the proposition that the company is bound in respect of this loan, which was made at the request of the secretary.

It is also plain from art. 116 that the applicant was not entitled to vote in respect of a matter of this kind. The claim, being defective, cannot be well founded, and the secretary had no authority to request the applicant to make this loan.

Evershed K.C. in reply, referred to Buckley on the Companies Acts, 11th ed., p. 170, and to *In re Wrexham, Mold and Connah's Quay Ry. Co.* (4)

Cur. adv. vult.

1938. April 12. BENNETT J. [after stating the facts set out above, continued :] The question involved is, perhaps, not without difficulty and is one upon which there is no direct authority. The argument of Mr. Evershed for the applicant was based almost entirely on principle rather than on authority. His argument was to the effect, first, that the advances were made upon the express request of Antrobus and so on the express request of the company, and that therefore the company came under an obligation to repay. Secondly, that the law would imply a request and therefore an obligation to repay from the facts, first, that the payments made by Creighton were not voluntary payments but payments made in expectation of repayment; secondly, that the company through Kelly, one of its directors, and Antrobus, its secretary, knew of this fact and acquiesced in it; and, lastly, that the company derived substantial benefit from the payments.

(1) [1913] 1 K. B. 364.
(2) [1914] A. C. 398, 440.
(3) 34 Ch. D. 234, 249.
(4) [1899] 1 Ch. 440, 464.

As regards the first ground, in my judgment it must be rejected. It is impossible, I think, to hold a limited company liable to repay moneys paid for its benefit at the request of its secretary. A secretary of a limited company has no authority to make such a request and so involve the company of which he is secretary in liability.

As regards the second ground, the argument was rested on the authority of *Lewis* v. *Campbell* (1), and a passage from the judgment of Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (2) The passage from Bowen L.J.'s judgment upon which reliance was placed is paraphrased in the following terms in the first volume of Smith's Leading Cases, 13th ed., at p. 156: "If a person knows "that the consideration is being rendered for his benefit with "an expectation that he will pay for it, then if he acquiesces "in its being done, taking the benefit of it when done, he will "be taken impliedly to have requested its being done: and "that will import a promise to pay for it."

It was admitted on behalf of the liquidator that the applicant made the payments in question in the expectation that the company would repay him. It was admitted that the company benefited from the payments; but what was disputed was that the company ever knew of or acquiesced in what was being done. The applicant's contention was that the knowledge of Kelly and Antrobus and their acquiescence was the knowledge and acquiescence of the company. In my judgment the argument of the applicant overlooks the vital fact that the company is an artificial and not a natural person and the fallacy of it lurks in the overlooking of that fact. A company incorporated under the Companies Acts can only function through agents authorized to act and acting within the limits of the company's constitution—namely, the provisions of the statutes to which it owes its being and its memorandum and articles of association. Under the articles of association of the company its business is to be managed by its directors, of whom two are to be a quorum. There never was in the present case knowledge of the facts in two directors of the company competent to act on behalf of the company, and the knowledge of the secretary and acquiescence by him cannot in my judgment be held to be knowledge and acquiescence of the company of such a quality as to enable a promise to pay to be implied on behalf of the company. To imply a promise by the company to pay in such a case as the present, there must be proof that a quorum of directors, competent to act, had knowledge that the payments were being made and acquiesced in the payments being made, and that the payer expected to be repaid by the company. There is no such proof in the present case, and, therefore, for those reasons, in my judgment the argument for the applicant fails.

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(1) 8 C. B. 541.

(2) 34 Ch. D. 234, 250.

Reliance was placed on the resolution of the directors passed on December 5, 1932, which I have read. I am not quite sure that I understand what was meant by resolving that certain advances which had been made at the request of the Cleadon Trust should be confirmed. The advances had not been made at the request of the Cleadon Trust, and no resolution of the directors could convert into fact something that never had been fact. If, as I believe, the intention was to ratify on behalf of the company a series of transactions entered into by the company's agents without authority, the resolution is inoperative, because it was not passed by a quorum competent to act. Ratification would have the effect of binding the company to a contract with Creighton. Art. 116 precludes Creighton from voting on such a matter, and without Creighton there was no quorum.

It was argued that the resolution fell within the proviso at the end of the Article as being an arrangement either giving Creighton a security for advances or by way of indemnity. In my judgment it was not an arrangement for doing either of these things ; it was neither more nor less than an attempt to ratify a series of unauthorized transactions. For those reasons in my judgment the applicant gains no assistance from the resolution.

In para. 10 (*a*) of the heads of claim the applicant claims to support his right to prove on the ground that in the accounts for the years 1931 and 1932 the sums for which he claims the right to prove were included in the liabilities, whilst the corresponding liabilities of Carlisles and P.B.C. were included in the assets of the company and that such accounts were duly approved and passed at general meetings of the company. The facts are as alleged in the paragraph, but in my judgment they do not assist the applicant because there was nothing in the accounts to inform the shareholders of the fact that the applicant was included amongst the creditors of the company. So far as the evidence goes there is no proof that they were ever told anything about the facts relating to the sums now in question or ever knew anything about them.

The result is that in my judgment the application fails. The truth of the matter is this. The applicant was the director of a public company. Its articles of association provided that its business was to be transacted by two disinterested directors. If the application were to be acceded to it would mean that the company would be bound by a series of transactions entered upon by one director only. Although Mr. Creighton held a majority of the shares, there were 62 other shareholders, and they were entitled to insist upon the directors of the company acting in accordance with the articles of association.

Solicitors: *T. D. Jones & Co.; Bentleys, Stokes & Lowless, for Criddle, Ord & Muckle, Newcastle-upon-Tyne.*

J. L. D.

MILLER *v.* AMALGAMATED ENGINEERING UNION.

MORTON J.

1938

April 26, 27.

[1937. M. 899.]

Trade union—Deceased member—Claim by personal representative for superannuation benefits—Not enforceable by action—Combination registered as a trade union deemed to be a trade union—Association unlawful at common law—Trade Union Acts, 1871 (34 *&* 35 *Vict. c.* 31), *ss.* 3, 4; 1876 (39 *&* 40 *Vict. c.* 22), *s.* 16; *and* 1913 (2 *&* 3 *Geo.* 5, *c.* 30), *s.* 1, *sub-ss.* 1, 2; *s.* 2, *sub-s.* 1; *s.* 8.

A trade union registered under the Trade Union Acts, 1871 to 1927, must be deemed to be a trade union within their meaning. Therefore, by virtue of s. 4 of the Act of 1871, it cannot be sued on an agreement for the application of its funds to provide benefits for members. An action by a deceased member's personal representative claiming arrears of superannuation benefit is "a legal proceeding instituted with the object of directly enforcing" an agreement of that kind, and will not be entertained by the Court:—

Held, further, that an association whose rules included rules conferring a power to expel members for disobedience, so that they would lose all benefits which the rules would otherwise have given them, thus enabling the association to compel members to take part against their will in such activities as strikes, was an unlawful association at common law, so that no action could be brought at common law to enforce payment of any sum payable under its rules.

Amalgamated Society of Carpenters, Cabinet Makers and Joiners v. *Braithwaite* [1922] 2 A. C. 440, considered and distinguished.

Russell v. *Amalgamated Society of Carpenters and Joiners* [1912] A. C. 421, followed.

WITNESS ACTION.

The plaintiff was the son and administrator of a deceased member of the defendant union, and claimed against the union a declaration that it was bound to pay to him arrears of superannuation benefit owing to the deceased at his death, and an order for payment to him of those arrears by the union. He claimed, alternatively, a declaration that the deceased was, at his death, a fully qualified member of the union, that the plaintiff was entitled to payment of the benefit due to the deceased under its rules, and that his right thereto was not prejudiced or barred by the failure of other relatives of the deceased to join in the claim.

The union contended that it was a trade union and an association unlawful at common law. As a trade union registered under the Trade Union Acts, 1871 to 1927, it relied on the Trade Union Act, 1871, and contended that the Court could not entertain the action.

The action was begun in the county court, and was remitted by writ of certiorari to the High Court for the trial of the issues of law. As those issues were the only matters before the Court, the Court was first addressed on behalf of the union.

Geoffrey Hutchinson for the union. Under the Trade Union Act, 1913, the result of any organization's being registered as a trade union is that it is deemed to be a trade union, and the question whether it is or is not lawful is for that particular purpose immaterial.

The first point in the case for the union is that, but for legislation, the union would, at common law, have been an unlawful association, on the ground that its objects were in unlawful restraint of trade. From that it would have followed that, at common law, it could neither have sued nor have been sued in an action such as that now before the Court. That, however, has ceased to be so since the passing of the Trade Union Act, 1871: see s. 3 of that Act. But, again, under s. 4, there are certain agreements which cannot be enforced by the Court, and the agreement which it is here sought to enforce, namely, an agreement to provide benefits to members of a trade union, is one of them. The question was decided in *Russell* v. *Amalgamated Society of Carpenters and Joiners.* (1)

The second point is that the union is in fact registered as a trade union. That fact has to be considered quite independently of the question whether the union, because it is an association in restraint of trade, is legal or illegal. Since it is registered as a trade union, it must be deemed to be one; and from that it follows that it comes within the Trade Union

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(1) [1912] A. C. 421.

Act, 1871, and that the present action cannot successfully be maintained against it. The object of s. 2 of the Trade Union Act, 1913, seems to have been to preclude thenceforth the argument which had been raised in *Russell* v. *Amalgamated Society of Carpenters and Joiners.* (1)

Rule 1 of the union's rules states its objects, and under sub-heading 3 of sub-rule 2 it is provided that for purposes of administration the union shall be divided into branches, to one of which every member shall belong. Under sub-heading 2 of that rule, the union is given, in order to achieve its objects, power to impose restraints on its members' labour and is given also certain powers of general interference. Rule 13, under the heading " District Committees," deals with the constitution of districts, and sub-rules 17 to 20 of that rule with the appointment of shop stewards and their powers and duties, with the powers of committees with regard to aggregate meetings, disputes and the veto of candidates for admission and with voting on general district disputes. Rule 21, headed " offences and penalties," provides, by sub-rule 1, for the expulsion of a member for certain offences, and for an expelled member's complete loss of benefits. Rule 29 states the circumstances under which an unemployed member shall be entitled to contingent benefit.

Two cases which were decided before the Trade Union Act, 1871, came into operation are the basis of the principle that a trade union is unlawful at common law because its objects are in restraint of trade: *Hornby* v. *Close* (2), *Farrer* v. *Close.* (3) Even to-day an action cannot be brought against a union, as such, unless it is a registered trade union, and before the Trade Union Act, 1871, no action at all could be brought against one in its corporate capacity. In *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1) the personal representatives of a deceased member of a union failed to recover benefit to which, they claimed, he had during his life been entitled.

Further, it is only by virtue of the Trade Union Act, 1871, that a union can be sued at all, and with that aspect of the matter the question whether it is a lawful or an unlawful association has nothing whatever to do. The plaintiff is precluded from proceeding against the union in the present case, because the action happens to be of a kind which, because of the Trade Union Act, 1871 (the very Act of which he is seeking to take advantage), cannot be brought. It is quite plain that it is not pleaded that the union is sued as a friendly society. It is impossible to distinguish *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1) from the present case. It is conclusive on the question and is binding on the Court: and the principle which it established appears to have been in some degree anticipated by *Cullen* v. *Elwin*. (2)

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(1) [1912] A. C. 421.
(2) (1867) L. R. 2 Q. B. 153.
(3) (1869) L. R. 4 Q. B. 602.

G. G. Baker for the plaintiff. The plaintiff's case falls into two parts, the first being dependent on the second. Whatever decision the Court might reach as to the union's being an association unlawful at common law and as to the consequences of its being registered as a trade union, it is quite clear that the plaintiff could take no other course than that which he has taken, of suing it in its corporate capacity. But the union is not an association unlawful at common law, and there are three reasons why it is not; nothing in its rules can be construed as being in restraint of trade, the portion of the rules directed to matters of superannuation is severable from the rest of them, and it is incorrect to describe the action as an action prohibited by s. 4 of the Trade Union Act, 1871: see Slesser and Baker on Trade Unions, pp. 23, 24.

It is clear that the union's rules are not construable as being in general restraint of trade. The Court must therefore inquire to what extent, if they are at all in restraint of trade, it is justifiable that they should be: and that is a question which must probably be answered quite differently at the present time from the way in which it would have been answered a generation previously. For example, it would be wholly inaccurate to-day to describe strikes as being in illegal restraint of trade. Again, it is incorrect to say that trade unions cannot be parties to actions in their corporate capacity:

(1) [1912] A. C. 421.

(2) (1904) 90 L. T. 840.

see Annual Practice, 1938, p. 898; *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants.* (1) There is nothing to prevent registered trade unions from so being parties.

[*Geoffrey Hutchinson.* It is not contended that there is any thing to prevent them. All that is contended is that their right so to be parties is a purely statutory right, and would not exist but for the Trade Union Act, 1871.]

Further, the plaintiff has nothing whatever to do with the question whether the union's rules are or are not in restraint of trade. All his working life the deceased member observed those of the rules which dealt with superannuation, and contributed gradually and unremittingly to a sum of money which the union now refuses to pay to his personal representative, on the ground that it is an association unlawful at common law because its objects are in restraint of trade. Whatever the merit of, or degree of truth in, that contention, the object of paying benefits to members cannot possibly be in restraint of trade. That is the only object with which the plaintiff is concerned, the only one which he seeks to enforce. He is not precluded by s. 4 of the Trade Union Act, 1871, from succeeding in the action. [He referred to *Gozney* v. *Bristol Trade and Provident Society* (2). *Baker* v. *Ingall* (3), and *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite.* (4)]

[MORTON J. It must be admitted that the plaintiff is seeking, among other things, to compel the union to pay to him money contended to have been due, under its rules, to the deceased. Is there authority for saying that an action of that kind is not a "legal proceeding instituted with the "object of directly enforcing" an "agreement for the application of the funds of a trade union, ..." to "provide "benefits to members, ..." within s. 4 of the Trade Union Act, 1871?]

Knowles v. *Booth* (5) is in some degree an authority for that contention.

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(1) [1901] A. C. 426.
(2) [1909] 1 K. B. 901.
(3) [1912] 3 K. B. 106.
(4) [1922] 2 A. C. 440.
(5) (1883) 32 W. R. 432.

Geoffrey Hutchinson in reply. *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1) finally settled how far a trade union's objects could be severed, and some held to be lawful and others unlawful. In that case it was held that if a trade union's main purposes were in unlawful restraint of trade, the possible legality of some or all of its other purposes was immaterial.

Under s. 2, sub-s. 1, of the Trade Union Act, 1913, a trade union, for the purposes of the Trade Union Acts, 1871 to 1913, is any combination of which the principal objects are, under its constitution, statutory objects; provided that any combination for the time being registered as a trade union shall, while continuing to be so registered, be deemed to be a trade union as provided by the Act. One of the purposes of the re-definition of a trade union in the Act appears to have been that of surmounting the difficulty of severability of a trade union's objects.

In the present case, the union has power to subject its members to a restraint for over-stepping the bounds of legality, and there can be no reasonable doubt that its principal objects are in unlawful restraint of trade.

Again, most of the authorities cited in support of the plaintiff's case deal with the expulsion of members from unions. Those cases were directed towards the member's keeping his status as a member, and only indirectly sought to enforce the agreement arising from membership for the application of the union's funds: they are entirely different from cases, of which the present is one, in which the main object is to enforce an agreement to pay benefits, that is to say, an agreement to deal with its own funds.

This is an action which the Court cannot entertain, and it should be dismissed.

MORTON J. [after stating the facts substantially as set out above:] The first contention of counsel for the union is that at common law the union is an unlawful association because its objects are in unlawful restraint of trade, the result being, as he says, that the union could not have been sued at common law. He also says that, even if the union is a lawful association at common law, it could not have been sued at common law in its name, the only possible procedure being one against its officials: and he says that, this action having taken the form that it has, the union, even if it is a lawful association, cannot be sued except subject to the provisions of the Trade Union Acts, 1871 to 1927. In the view which I take of this case, the question whether this second contention is correct or incorrect does not arise.

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(1) [1912] A. C. 421.

Counsel for the union then went on to argue that although the Trade Union Act, 1871, enabled an association which is unlawful at common law to be sued in certain cases, the Court cannot entertain the present action by reason of the provision of s. 4 of the Trade Union Act, 1871. As to the question whether the union is a trade union within s. 4 of the Act of 1871, counsel for the union says, first, that the union comes within the definition of a trade union in the Trade Union Acts; and, secondly, that, whether it does or does not come within that definition, it must be deemed to be a trade union for the purpose of the Act of 1871 by reason of certain provisions in s. 2 of the Trade Union Act, 1913.

In order to ascertain whether the union is a trade union within the meaning of the Act of 1871 and whether it is an association unlawful at common law, it is necessary to consider first of all the relevant statutory provisions; and, secondly, the union's rules. By s. 3 of the Trade Union Act, 1871, it is provided that " The purposes of any trade union "shall not, by reason merely that they are in restraint of "trade, be unlawful so as to render void or voidable any "agreement or trust." That section no doubt had the effect that in certain cases an association unlawful at common law might be sued. But by s. 4 certain limitations are put on the actions which can be brought against such an association, and I shall now read the portions of that section which are relevant for the purpose of this action: " Nothing in this "Act shall enable any court to entertain any legal "proceeding instituted with the object of directly enforcing or "recovering damages for the breach of any of the following "agreements, namely, ... (3.) Any agreement for the "application of the funds of a trade union,—(*a*) To provide "benefits to members; . . . . But nothing in this section "shall be deemed to constitute any of the above mentioned "agreements unlawful."

Sect. 23 of the Act contains a definition of a trade union, but I need not read this section because s. 16 of the Trade Union Act Amendment Act, 1876, provides: "So much of "section twenty-three of the principal Act"—the principal Act being the Trade Union Act, 1871—"as defines the term "trade union, except the proviso qualifying such definition, "is hereby repealed, and in lieu thereof be it enacted as "follows: The term 'trade union' means any combination, "whether temporary or permanent, for regulating the relations "between workmen and masters, or between workmen and "workmen, or between masters and masters, or for imposing "restrictive conditions on the conduct of any trade or business, "whether such combination would or would not, if the "principal Act had not been passed, have been deemed to "have been an unlawful combination by reason of some one "or more of its purposes being in restraint of trade."

By s. 1 of the Trade Union Act, 1913: "(1.) The fact "that a combination has under its constitution objects or "powers other than statutory objects within the meaning of "this Act shall not prevent the combination being a trade "union for the purposes of the Trade Union Acts, 1871 to "1906, so long as the combination is a trade union as defined "by this Act, and, subject to the provisions of this Act as to "the furtherance of political objects, any such trade union "shall have power to apply the funds of the union for any "lawful objects or purposes for the time being authorised "under its constitution." Then sub-s. 2 is as follows: "For "the purposes of this Act, the expression 'statutory objects' "means the objects mentioned in section sixteen of the Trade "Union Act Amendment Act, 1876, namely, the regulation "of the relations between workmen and masters, or between "workmen and workmen, or between masters and masters, "or the imposing of restrictive conditions on the conduct of "any trade or business, and also the provision of benefits to "members."

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Counsel for the union has submitted that the union is a combination which comes within every portion of that definition except that dealing with the regulation of the relations between masters and masters, and I must turn later to the union's rules to see whether that contention is well founded. By s. 2, sub-s. 1, of the Trade Union Act, 1913: "The "expression ' trade union ' for the purpose of the Trade Union "Acts, 1871 to 1906, and this Act, means any combination, "whether temporary or permanent, the principal objects of "which are under its constitution statutory objects: Provided "that any combination which is for the time being registered "as a trade union shall be deemed to be a trade union as "defined by this Act so long as it continues to be so registered."

It is admitted that the union is for the time being registered as a trade union, and I think that the contention of counsel for the union that it is to be deemed to be a trade union for the purposes of s. 4 of the Trade Union Act, 1871, is well founded; but I propose to consider also, in the course of going through some of the rules, whether it is in fact within the definitions which I have read.

I think there is nothing more that I need read in the Trade Union Acts except s. 8 of the Trade Union Act, 1913, which enacts: " This Act may be cited as the Trade Union Act, "1913, and shall be construed as one with the Trade Union "Acts, 1871 and 1876; and this Act and the Trade Union "Acts, 1871 to 1906, may be cited together as the Trade "Union Acts, 1871 to 1913."

The rules of the union are somewhat voluminous, and I shall refer only to those which seem to me particularly relevant to the questions which I have to decide. By rule 1, sub-rule 1, which is headed " Name, Objects, and Constitu-"tion," it is provided: " The union formed under these "rules, hereinafter called ' the union,' shall be named the "Amalgamated Engineering Union. It shall be a registered "trade union. The union shall consist of male workers "engaged in the engineering, shipbuilding, and kindred trades, "together with such trades as may be represented by trade "unions hereinafter amalgamating with the union. Sections "shall be established covering grades of membership in "accordance with the contributions and benefits relating "thereto." Then the objects of the union are stated by sub-rule 2, but although they are of some importance, I do not think I need read more than three paragraphs from this sub-rule. One of the objects is stated to be : " The negotiation "and settlement of differences and disputes between the "members of the union and employers by collective bargaining "and agreement, withdrawal of labour or otherwise."

Then I find this provision : " In order to achieve the "above objects the union shall have power, in addition to "other powers conferred by law or by these rules, to impose "such restraints upon the labour of its members or generally "to interfere, whether such interference is in restraint of "trade or not but so far only as may otherwise be lawful, "with the trade or conduct of such industries, businesses, "and occupations as may be deemed expedient."

Then the same rule continues : " The union if a constituent "part of the Trades Union Congress shall be empowered to "take such action by way of a strike as may be determined "from time to time by the General Council of the Trades "Union Congress, either separately or in conjunction with the "National Executive of the Labour Party. In particular the "union shall have power to provide funds for maintaining all "or some of the benefits from time to time authorised in "pursuance of these rules, and for the establishment or maintenance of any undertaking of any kind, financial or otherwise, authorised by the union, and for any action, including "collective bargaining, striking, withholding of labour, taking "action under the Trade Boards Act or other statutes either "severally, or jointly, or in conference, securing agreements "concerning wages or other conditions of the contract of "service, whether in defence of its own members, or in support "of other workers of allied or other industries, which may, "in the opinion of the union or of its executive council, be "deemed to be calculated to further the interests of the "union or of the trade union movement generally."

It is to be observed that under sub-rule 2 there is no separation made of any particular fund for any particular purpose. The union is to have power to provide funds for various purposes, which include the providing of benefits and include any action, such as collective bargaining, striking, and so on.

In rule 13 there are certain provisions which I need not read, regarding the constitution of districts, the setting up of district committees, and the instituting of shop committees and shop stewards. I think I need refer only to this, that the district committees are to define systematic overtime in their respective districts, and are to have power to define all claims for overtime made under the plea of emergency, and members must not under this plea work more than the stipulated amount of overtime without the consent of the district committee. Under sub-rule 17: "The powers and "duties of shop stewards, shop committees, and conveners "shall include the following:—To examine and sign at least "once a quarter the contribution cards of all members, to "use every endeavour to see that all men starting are duly "qualified trade unionists, and that all persons are receiving "the approved rates and complying with the practice of the "shop and district, and for these purposes to examine cards "and pay-tickets, and to report to the district committee "any case in which the position is not satisfactory and cannot "be adjusted within the shop," and so on.

Then by sub-rule 20 of rule 13 it is provided: "No "general strike shall be entered upon in any district affecting "the whole of the members unless carried by a majority of "three votes to two of the members voting of said district; "a majority to decide on a settlement. The vote must be "taken by ballot. The executive council, or the colonial "councils, having given the district committee permission to "take such a vote, shall have no power to interfere with its "operation."

By sub-rule 21 it is provided that: "No member shall ask "for or take work by any system of payment by results or "contract in any firm or factory where such system of payment "does not exist without the approval of, and in conformity "with the conditions as laid down by the district committee." It is apparent from the passages which I have read that the district committee and the shop committee have considerable control over the actions of the members of the union.

By rule 15, sub-rule 8, it is provided that: "The "executive council shall have power to take a ballot vote of the "members to authorise the raising of levies to assist any effort to "improve the position of the union, or the general trade union "or Labour movement, and shall notify the branches when "such levies must be charged, and shall have power to make "grants from funds so raised by levy from time to time, "according to their discretion, but the reasons for arriving at "decisions shall be clearly stated to member or branches "claiming to know them." Then: "In the event of a district "dispute the executive council shall, on the application of the "district committee, take a ballot vote of the whole of the "union for a levy in order to do away with extraneous collections, or excess levies in districts surrounding strike areas. "Such levy shall not exceed 6*d*. per member per week, and "shall not be retrospective, and shall not be in force for more "than two months without a further ballot vote being taken "as to the continuation of the same." So that under that there is power to raise money from the members by a levy, which appears to be a compulsory levy, for purposes which would, I suppose, include a strike.

Rule 20 lays down certain rules as to the jurisdiction of the executive council to hear appeals, and I need refer, I think, only to sub-rule 1: "As regards the jurisdiction of "the executive council to hear appeals from branches or "members. Where the executive council specifically order "any act to be done and the branch or member is dissatisfied, "the branch or member must comply with the order of the "executive council before proceeding with a further appeal, "provided that the executive council must decide such appeal "within three weeks of the case being presented to them."

That, again, is an illustration of the control which is given to the executive council over the acts of individual members.

Rule 21 is, I think, of great importance. Rule 21, sub-rule 1, deals with the expulsion of a member in the following terms: "Without prejudice to any other grounds of expulsion herein "contained any member of the union who, in the opinion of his "branch or the executive council, shall have injured or "attempted to injure the union, or worked or acted contrary "to the interests of the union or its members, or have attempted "to break up or dissolve the union otherwise than as allowed "by these rules, or otherwise brought the union into discredit "or refused to comply with the order or decision of any "committee, council, or conference having jurisdiction over "such member under these rules or requested or taken work "from any employer at any place where or when a trade "dispute exists between such employer and the union or any "branch thereof, or obtained or attempted to obtain any of "the benefits of the union by means of misrepresentation, or "have knowingly participated in or been a party to any fraud "perpetrated upon the union, or any misappropriation or "misapplication of its funds or the funds of any branch thereof, "or whose conduct shall have been otherwise inconsistent with "the duties of a member of this union, or who being an officer "shall have refused to perform the duties imposed upon him "by these rules or any of them, may be expelled by his branch, "with the approval of the executive council, or he may be "excluded by the executive council from the union, and shall "thereupon, subject to his right of appeal as in these rules "provided, cease to be a member thereof. Every expelled "member shall cease to have any claim on the funds and "benefits of the union, and shall forfeit all right to participate "in the privileges thereof." Then there is a provision as to giving notice of the intention to proceed against any member.

That, of course, is a very striking power which is vested in the officials of this particular union, and it seems to involve this: that any man, no matter how many contributions he may have paid to the funds, and no matter how much superannuation benefit he may thereby have become entitled to, must, if he disobeys the orders and decisions of any committee or council, be liable to forfeit every benefit which he would otherwise have had under the rules. That, of course, supplies a very strong weapon for compelling any man to take part, for example, in a strike, whether he desires to take such part or not, and it is a rule which is, in my opinion, of great importance in ascertaining whether at common law, and apart from the Trade Union Acts, the union is an unlawful association.

I think I need only refer briefly to rule 28, which deals with donation benefit. It is perhaps worthy of notice that by sub-rule 2: "Any member who may be signing after a "strike, shop dispute or lock-out shall have his donation "benefit made up to the full scale for his section from an "auxiliary grant."

Rule 29 provides by sub-rule 1: "Should any member be "unemployed from any of the causes herein named, he shall "be entitled to contingent benefit at the rate of 5*s.* per week "upon production of evidence satisfactory to the executive "council." The causes referred to in that rule are, broadly speaking, strikes or withdrawals of labour.

Reading the rules as a whole, I do not entertain the slightest doubt that the union is a trade union within the meaning of the Trade Union Acts; indeed, although the point was not, I think, conceded by Mr. Baker, on behalf of the plaintiff, it was hardly seriously argued. Moreover, I do not see any flaw in Mr. Hutchinson's argument that the union, being admittedly registered as a trade union under the Acts, must be deemed to be a trade union within the meaning of the Acts: nor did counsel for the plantiff draw my attention to any flaw in that argument.

The next question which I have to determine is: Is this action a "legal proceeding instituted with the object of directly "enforcing an agreement for the application of the funds of a "trade union to provide benefits for members" within the meaning of s. 4 of the Trade Union Act, 1871?

Counsel for the plaintiff has referred me to certain authorities on this aspect of the case, for example, *Gozney* v. *Bristol*

Trade and Provident Society (1), and in particular an observation of Fletcher Moulton L.J. He has also referred to *Baker* v. *Ingall* (2), and in particular to a quotation by Kennedy L.J., who delivered a dissenting judgment in the Court of Appeal; and to a passage from the judgment of Lord Halsbury in the case of *The Yorkshire Miners' Association* v. *Howden*. (3)

Lastly, counsel for the plaintiff referred me to, and strongly relied upon, *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite*. (4) He relied strongly upon certain passages in the speeches; first, a passage in the speech of Lord Buckmaster, which is as follows (5): "Looking at the "words of the section alone"—that is s. 4 of the Trade Union Act, 1871—"unaided and unembarrassed by previous decisions, "I should have thought it plain that an action which in fact "asks for nothing but a declaration as to the construction of "a rule as to membership and as incident thereto, an injunc-"tion, was not an attempt to enforce directly any such agree-"ment as that referred to in the statute. It is, of course, true "that no such claim could lie unless there were some right of "property possessed by the member by virtue of his member-"ship. And one of the most obvious instances of such right "is his right to share in the benefits provided for members. "But in this action there is no direct attempt to interfere with "the application of the funds at all. It is nothing but a "declaration as to membership with an injunction in its "support. It appears to me that it is a totally different "proposition to say that a man claims to possess rights and "that he seeks to enforce the obligations they create. The latter "may be prevented by the statute; the former is not."

Applying those words to the case before me, it is, I think plain that there is in the present action a direct attemp interfere with the application of the funds, and it co be said of this action, as was said by Lord Buck *Braithwaite's* case (5), that the action seeks n

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(1) [1909] 1 K. B. 901, 918.
(2) [1912] 3 K. B. 106, 123.
(3) [1905] A. C. 256.
(4) [1922]
(5) Ibi

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declaration as to membership and an injunction in its support. On the contrary, the whole essence of this action is that the plaintiff is saying to the union: "You owe me a sum under "the rules, and you must pay it, and you owe me that sum by "way of a benefit, and that benefit is to be paid out of the "union's funds." It is true that in this case there are certain alternative claims which, if they had stood alone and if the statement of claim had been framed in a very different way, might possibly have been outside the provisions of s. 4—as to that I express no opinion. But in my view the action, framed as it is, with the allegations of fact which the statement of claim contains and with the claims for money which the statement of claim contains, is a clear instance of an action seeking directly to enforce an agreement for the application of the funds of the trade union to provide benefits to members. I see no parallel between the present action and the action which Lord Buckmaster was considering.

Counsel for the plaintiff also relied upon other passages in *Braithwaite's* case. (1) I do not think I need refer to them at length; it seems to me that I must look at this proceeding as a whole—and there is only one proceeding, not two—and inquire whether or not it comes within the wording of the section, and, in my opinion, it clearly does.

The last question which I have to consider is this: Is the union an association unlawful at common law so that no action can be brought at common law to enforce payment of any sum which may be payable under its rules? It is clear that the union's rules impose very definite restrictions upon the way in which the members of it can carry on their trade, but as was said by Lord Macnaghten in *Russell* v. *The Amalgamated Society of Carpenters and*
ers and Others (2) it is not every restraint of trade
s unlawful. The illegality at common law of the
of trade depends upon the nature and extent of the
Counsel for the union has referred me to the case
ust quoted, and has argued that if, as was held
ten, Lord Shaw of Dunfermline, Lord Mersey

440.

(2) [1912] A. C. 421, 430.

and Lord Robson, in that case, the respondent society in that case was an unlawful association at common law, then a fortiori the union in the present case is an unlawful association at common law also. I do not propose to state in detail the facts of *Russell's* case (1) or to compare the rules of the respondent society in that case with the union's rules in this case. It is sufficient to say that, having carefully considered both sets of rules, I am satisfied that the union in this case is no less an association unlawful at common law than was the respondent society in *Russell's* case. (1)

Counsel for the plaintiff said all that he possibly could say in support of the plaintiff's case, and he endeavoured to convince me, on this branch of the case, that there is nothing in the union's rules which is in restraint of trade, and that if there is, the rules have two co-ordinate objects with no nexus between them, those objects being, first, the object of restraint of trade, and, secondly, the object of providing benefits for members. I agree that the objects of the union embrace both of these objects. In my view, the former is the primary object and further, there is this very strong nexus between the two, that if a member under rule 21 disobeys the orders of the council as to his behaviour, for example, in regard to a strike, he forfeits all the benefits which he otherwise would have got from the funds.

Counsel for the plaintiff has referred to rule 33 and has pointed out that it provides for the allocation to a superannuation reserve fund of a sum of not less than 2*s*. per quarter in respect of certain members, and it provides for the investing of those moneys apart from the general funds of the union, and those moneys are not to be used "for any purpose except "reinvestment, subject to executive council having the power "to transfer from the Superannuation Reserve Fund to the "General Fund, an amount equal to one third of the total "annual cost of Superannuation Benefit, until, in the opinion "of executive council, the General Fund is in a position to "meet the greater proportion of Superannuation Benefit."

I do not think it could possibly be said that the mere existence of this Superannuation Reserve Fund amounts to a severance between the funds which are to be devoted to benefits for members and funds which are to be devoted to other purposes. I think it is clear from the rules that contributions go into one general fund and are applicable to all the purposes of the association, and rule 33 merely provides machinery for the keeping up of the superannuation benefits in case at any time the general funds are insufficient to keep them up. The result is that, in my view, one cannot separate, in this case, the objects in restraint of trade and the objects which deal with providing benefits for members.

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(1) [1912] A. C. 421, 430.

In my view I am bound to hold that the Court is not able to entertain this action by reason of s. 4 of the Trade Union Act, 1871, and that, the union being an association unlawful at common law, the action could not be maintained at common law whether or not it could have been so maintained, in its present form, if the union had been an association lawful at common law.

In these circumstances, I have to consider what form of order I ought to make. Counsel for the plaintiff has urged me not to dismiss the action, but to leave it in being for certain purposes which he has laid before me. I am not disposed to do that. If the action is one that the Court cannot entertain, it is an action, in my view, which should be put an end to, here and now, and I propose to dismiss the action.

Solicitors: *Scott Duckers & Co.; Evill & Coleman.*

K. R. A. H.

REFUGE ASSURANCE COMPANY, LIMITED *v.* PEARLBERG.

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May 27.

[MANCHESTER DISTRICT REGISTRY.]

Mortgage—Mortgagees in possession—Appointment of receiver—Possession taken by receiver before appointment executed—Power of mortgagee in possession to appoint receiver—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 101, *sub-s.* 1 (*iii.*) ; 109.

The power conferred on a mortgagee by s. 101, sub-s. 1 (iii.), of the Law of Property Act, 1925, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property or any part thereof, may be exercised after the mortgagee has gone into possession.

Anchor Trust Colliery Co., Ld. v. *Bell* [1926] Ch. 815 followed.

So *held* by the Court of Appeal, affirming the decision of Simonds J., ante, p. 572.

A summons was taken out by the plaintiffs under O. 55, r. 5A, asking for the foreclosure or sale of certain property mortgaged by the defendant to them. An order was made in the action, by Bennett J., dated June 10, 1937, for accounts and inquiries in the usual form, including an inquiry whether the plaintiffs had entered into possession of the mortgaged premises, and in the event of an affirmative answer to that question, that accounts of rents and profits received should be taken on the footing of wilful default. The issue whether or not the plaintiffs had gone into possession was referred by the registrar to the judge.

Proceedings having been taken upon this order, the form of inquiry was altered and enlarged as follows: an inquiry whether the plaintiffs had gone into possession of the mortgaged property at any time, and if so how long they remained in possession; this form of inquiry being necessitated by the facts and the questions of law raised on the summons.

The action concerned three mortgages, each being a charge by way of legal mortgage created by deed, the mortgagor being the first defendant, Henry Hyman Pearlberg, and the mortgagees being the plaintiffs, the Refuge Assurance Co., Ld.

The first mortgage, dated December 21, 1926, was of property in East Street, Manchester, the sum secured being 17,000*l.*; the second dated October 2, 1928, of property in Moseley Street, Manchester, to secure 15,000*l.*, and the third, dated November 21, 1928, of property in Dickinson Street, Manchester, to secure 40,000*l.* The last named premises were also subject to a second mortgage vested in the second defendant, Beatrice Pearlberg, the wife of the first defendant.

Interest on these mortgages having fallen into arrear, the plaintiffs, on October 23, 1931, having previously given instructions for a deed appointing a receiver to be prepared, put a Mr. Roberts into possession of the mortgaged premises, intending so to put him in as receiver under the statutory powers contained in the Law of Property Act, 1925. The deed so appointing him receiver, though it bore date October 23, 1931, was not in fact signed, sealed and delivered by the plaintiffs until November 11, 1931, nineteen days later, during which period Roberts was in possession of the mortgaged premises, and he continued in possession afterwards.

Simonds J. found as facts (1.) that the interest on the East Street and Moseley Street mortgages was two months in arrear on October 23, 1931, and therefore that the statutory power of appointing a receiver had arisen, (2.) that the interest on the Dickinson Street mortgage was not then two months in arrear, but became so in arrear on October 24; therefore as regards the latter property the right to appoint a receiver had not arisen when possession was taken by Roberts on October 23, and did not arise until October 24. The result was that, as the plaintiffs admitted, and his Lordship found, the plaintiffs had gone into possession of the mortgaged premises by Roberts as their agent on October 23, 1931, that they remained mortgagees in possession from October 23 to November 11, 1931, and that as from the latter date, if the plaintiffs had power to do so, Roberts had been duly appointed receiver of the premises and the rents and profits thereof. The question, which alone calls for a report was then argued—namely, whether the plaintiffs having entered as mortgagees into possession of the mortgaged premises could appoint a receiver on November 11. The plaintiffs contended that they had power to do so, the defendants that they could not.

Simonds J. held (1), that the power to appoint a receiver had been properly exercised, notwithstanding that the mortgagees had entered into possession before the appointment was executed.

The defendant appealed. The appeal was heard on May 27, 1938.

Harold Christie K.C. and *David Weitzman* for the appellants. It is well settled that a mortgagee, by virtue of having the legal estate, is entitled to take possession; but, because he has this power, which might be exercised in an oppressive manner, courts of equity have regarded the power with severity and held him liable to account on the footing of wilful default. The appointment of a receiver does not affect the possession of the mortgagee or his liability to account.

All the old cases show that, when once a mortgagee has taken possession, he is committed to it and must continue in it; and the Court will see that he is diligent. A mortgagee in possession has never been allowed to go out at his pleasure. If the Court appoints a receiver, he takes precedence of the mortgagee or mortgagor, or any one else. Whether there be a receiver or not, that does not operate to put a mortgagee out of possession.

They referred to ss. 101 and 109 of the Law of Property Act, 1925.

As the Court would not allow a mortgagee to go out and thus terminate his liability, neither would it allow him to do indirectly that which he could not do directly, by taking advantage of the procedure of appointing a receiver.

They referred to *In re Prytherch* (2); *Anchor Trust Colliery Co., Ld.* v. *Bell* (3); *Noyes* v. *Pollock* (4); *Hall* v. *Heward* (5); *Coppring* v. *Cooke* (6); *Heales* v. *M'Murray* (7); *Tillett* v. *Nixon* (8); and *Mason* v. *Westoby*. (9)

(1) Ante, p. 572.
(2) (1889) 42 Ch. D. 590.
(3) [1926] Ch. 805.
(4) (1886) 32 Ch. D. 53.
(5) (1886) 32 Ch. D. 430.
(6) (1684) 1 Vern. 270.
(7) (1856) 23 Beav. 401.
(8) (1883) 25 Ch. D. 238.
(9) (1886) 32 Ch. D. 206.

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Alexander Grant K.C. and *H. S. Barker* for the respondents were not called upon to argue.

Sir Wilfrid Greene M.R. This appeal is concerned with one short point of law. The other matters in the case which were presented before Simonds J. have now disappeared from it. There were one or two minor points which Mr. Christie touched upon very lightly, but they were points which he was constrained to confess he could not seriously press upon us. I therefore confine what I have to say to the substantial point in the case.

The plaintiffs obtained an order for foreclosure nisi on June 10, 1937. It related to mortgages of three blocks of property in Manchester and two insurance policies which were held as collateral security. There were, in point of fact, three separate mortgages, one for each block of property, two of the three having this collateral security added. That order directed accounts and inquiries, in the usual form, including an inquiry whether the plaintiffs had entered into possession. If they did, then there was to be an account on the footing of wilful default.

The issue as to whether or not they had entered into possession was dealt with in court before Simonds J., evidence was called and disputed issues of fact were gone into. The issues of fact as to payment of interest, interest being in arrear and so on, were all decided by the learned judge in favour of the plaintiffs and, accordingly, there is left now this issue which may be quite simply stated.

The plaintiffs went into possession on October 23, 1931, that is not disputed. On November 11, 1931, they executed the usual form of appointment appointing Mr. Roberts, estate agent, as receiver. Mr. Roberts, in fact, was the person who, on October 23, 1931, had been put into possession by the plaintiffs on their behalf. The short point is: what was the effect of that appointment of Mr. Roberts as receiver? Did it, as the defendant (the appellant) urges, leave the plaintiffs still in possession, or, at any rate, in the position of persons who must be treated as being in possession with a consequential liability to account on the footing of wilful default, or must the plaintiffs be treated as having gone out of possession when they made that appointment on November 11, 1931? The learned judge held that the latter view was the correct one and, in my opinion, his judgment was perfectly right.

The appointment was made under the powers contained in the Law of Property Act, 1925, s. 101, sub-s. 1 (iii.), and s. 109. I need not read those sections, but it is worth noticing that the powers which they confer are conferred to the like extent as if they had been given in the mortgage deed. We are therefore dealing with what may be described as a statutory term imported into the mortgage deed and regulating the contractual relations between the parties.

Approaching the matter as a pure matter of construction of the language used, it appears to me, as it appeared to the learned judge, to be beyond question that the words in which the power to appoint a receiver is expressed are perfectly clear words which are not limited so as not to apply where the mortgagee is in possession at the date when he makes the appointment. There is no such express limitation.

Mr. Christie put his argument in three ways. First of all, he said (although he did not develop it at any length) that the statutory power must be read as containing an implied proviso to the effect that the power may not be exercised by a mortgagee in possession. The effect of that, of course, if it were right, would have been that in the present case the appointment of November 11, 1931, would have been a nullity. In my opinion, no such implication ought to be read into those perfectly plain words. It is said that they must be construed in the light of the fundamental rules of equity which regulate the relation of mortgagor and mortgagee, and particularly the strict rule which has always been applied to mortgagees who go into possession. I see no reason in any of the rules of equity relating to these matters for reading into the contract between the parties something which is not there. Why we should read into the statute words which are not there, I am afraid I cannot follow.

However, Mr. Christie had two other ways of putting his case. He said that the section must be read, not as prohibiting the appointment when the mortgagee is in possession, but as subject to a proviso that the exercise of the statutory power by a mortgagee in possession is not to affect the continuance of his possession. In other words, he is to be treated as still being in possession for the purpose of liability to account on the footing of wilful default, notwithstanding the circumstance that he has appointed a receiver who, of course, is the agent of the mortgagor. It seems to me that if it were possible to find something more impossible to import by implication than the suggestion with which I have already dealt, it would be found in this suggestion, which imputes to the Legislature an intention to produce a result which appears to me to be quite fantastic, a result under which, at one and the same time, there would be a receiver appointed under the section and a mortgagee having possession outside the section. The two positions appear to me to be too incompatible with one another to permit of any such suggestion. In the present case the incompatibility appears very clearly, because, if the argument were correct, it would mean that Mr. Roberts is to be treated at one and the same time as the agent of the plaintiffs, to retain possession of the premises on their behalf, and as receiver appointed by the plaintiffs as agent of the mortgagor, to collect the rent—two positions which are entirely inconsistent one with the other.

The third proposition was that even if the construction of the section be what in my opinion it is, without any implied proviso, nevertheless the power which it confers is one which a court of equity will not allow to be enforced. No ground was suggested why equity should interfere with the exercise of the power and I can see no reason why it should do so. There is nothing oppressive about the matter; it is in effect part of the contract between the parties and on no principle that I can discover could it be said that a court of equity would be justified in interfering with the exercise of the power.

A number of authorities have been cited to us. I do not find it necessary to refer to them. Certain of them are referred to in the judgment of the learned judge. There is a dictum of Pearson J. and a dictum of Lawrence J., each of which supports the view that under the statutory power the mortgagee is entitled to appoint a receiver notwithstanding that he is in possession. While finding support for the view which I have formed in the observations of those learned judges, I should myself have come to the same conclusion quite clearly as a matter of principle. When one comes down to the basis of the matter, it is a question of the construction of this provision in the Act of Parliament: Is it or is it not proper or necessary to read into that provision some implied term, qualification or proviso; is there any doctrine of equity which compels us to do that, or is there any doctrine of equity which compels us, if it is not to be read in, to deprive the mortgagee of the rights which, as a matter of construction, the statute gives to him? I know of no such doctrine.

In my opinion, therefore, the appeal fails and must be dismissed with costs.

Scott L.J. I agree.

Clauson L.J. I agree.

Solicitors: *John T. Lewis & Woods, for Laurence Marks, Manchester; Hopwood & Sons, for William Proctor Green, Manchester.*

J. L. D.

C. A.

1938

May 20, 23.

In re A DEBTOR.

[No. 21 of 1937.]

Bankruptcy—Married woman—Judgment debt—Part of debt incurred before Law Reform (Married Women and Tortfeasors) Act, 1935, *in force—Bankruptcy notice in respect of judgment debt—Bankruptcy petition—Invalidity of bankruptcy notice—No right to receiving order—Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *s.* 1 (*d*); *s.* 4, *sub-s.* 1 (*c*).

The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, provides: "Subject to the provisions of this Part of this "Act . . . ., a married woman shall— . . . . (*d*) be subject to "the law relating to bankruptcy and to the enforcement of "judgments and orders."

Sect. 4, sub-s. 1: "Nothing in this Part of this Act shall— ". . . . (*c*) enable any judgment or order against a married "woman in respect of a contract entered into, or debt or obligation "incurred, before the passing of this Act, to be enforced in bankruptcy or to be enforced otherwise than against her property."

Where therefore judgment has been obtained against a married woman for a debt, part of which was incurred before the passing of the Act of 1935, a bankruptcy notice issued in respect of the judgment is invalid; since the judgment is not divisible, and, since the bankruptcy notice is a step in the enforcement in bankruptcy of a judgment in respect of a debt incurred before the passing of the Act contrary to s. 4, sub-s. 1 (*c*), of the Act, it follows that failure to comply with the notice is not an act of bankruptcy, and a bankruptcy petition founded on it necessarily fails.

Decision of the Divisional Court (Luxmoore and Morton L.JJ.) reversed.

APPEAL from the Divisional Court.

The debtor was a married woman and incurred a debt of 77*l*. 5*s*. in respect of furs purchased from a firm called Weald Furriers (hereinafter referred to as "the creditor"). Two sums of 1*l*. and 3*l*. were paid on account, leaving a balance due of 73*l*. 5*s*. Of this indebtedness the item of 5*l*. 5*s*. was incurred before the Law Reform (Married Women and Tortfeasors) Act, 1935, became law on August 2, 1935. It was the amount charged for a dyed wolf cape purchased on May 11, 1935.

On January 11, 1937, the creditor commenced proceedings in the Guildford county court to recover the sum of 73*l*. 5*s*., and on February 11, 1937, he obtained judgment against the debtor for this sum and 5*l.* 13*s.* 6*d.* costs, making together the total sum of 78*l.* 18*s.* 6*d.*, which was made payable in quarterly instalments of 10*l.* each. The instalment due on March 25, 1937, was not paid and on October 14, 1937, the creditor obtained the issue of a bankruptcy notice in respect of this sum of 78*l.* 18*s.* 6*d.* On December 14, 1937, the creditor petitioned for a receiving order on the debtor's failing to comply with the bankruptcy notice.

The Registrar of the Guildford county court dismissed the petition on the ground that the bankruptcy notice was based on a judgment obtained in respect of a contract by a married woman for the purchase of goods, part of which was supplied to her before August 2, 1935, and that the judgment was indivisible and inseparable.

The creditor appealed from the decision of the Registrar on the ground that he was wrong in law in holding that the receiving order could not be made against the debtor, seeing that the judgment was obtained in proceedings to recover a number of debts, one only of which had been incurred before the coming into operation of the Law Reform (Married Women and Tortfeasors) Act, 1935, and that the total amount of the debts incurred after the coming into operation of the Act was in excess of 50*l.*

The Divisional Court (Luxmoore and Morton JJ.) allowed the appeal. Luxmoore J. in giving the judgment of the Court said that the judgment of the county court dated February 11, 1937, was drawn up in accordance with Form 138 of the County Court Forms, 1936, which was entitled "Judgment or order against a married woman on contract "entered into before the 2nd of August, 1935." There was an obvious clerical error in this as the form was plainly applicable to a contract entered into after August 2, 1935, in view of Order XXIV., r. 3, of the County Court Rules which provided that " A judgment or order against a married woman shall "be in such one of the Forms in the Appendix as would be "applicable if she were a feme sole, unless the court otherwise "directs: Provided that—(*a*) where the judgment or order

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"is in respect of a contract entered into or a debt or obligation "incurred before the 2nd day of August 1935, the minute of "the judgment or order shall contain a note showing that "the contract was entered into or the debt or obligation "incurred before that date and that the judgment or order "is not enforceable otherwise than against the property of "the married woman." Here the judgment should have noted the facts so far as concerned the particular part of the sum referable to the earliest contract. This was not done and the judgment was in the form applicable when the whole sum recovered was due by a married woman in respect of a debt incurred after August 2, 1935. The question was whether the issue of a bankruptcy notice in respect of a judgment, part of which was for a debt incurred by a married woman before August 2, 1935, was an enforcing of that order in bankruptcy contrary to s. 4, sub-s. 1 (*c*), of the Act of 1935. It must be remembered that in view of s. 2 of the Bankruptcy Act, 1914, a bankruptcy notice for a larger sum than was due was not invalid " unless the debtor "within the time allowed for payment gives notice to the "creditor that he disputes the validity of the notice on the "ground of such misstatement." No such notice was given here. The questions were (*a*) whether the Court could look behind the judgment and inquire into and ascertain the amount actually due from the debtor, and (*b*) whether, if it could and it ascertained that the amount due exceeded 50*l.*, it should make a receiving order. The case in the Court of Appeal of *In re A Debtor* (1), where Scrutton L.J. felt bound by the judgments of Lord Esher in *In re Vitoria* (2) and *In re Fraser* (3), and referred also to *Ex parte Lennox* (4), showed that the Registrar could have looked behind the judgment to see whether there was a debt exceeding 50*l.* enforceable in bankruptcy and could, on satisfying himself that there was, have made a receiving order. For these reasons the Registrar was in error in refusing to make a receiving order and his decision must be reversed.

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(1) [1917] 2 K. B. 60.
(2) [1894] 2 Q. B. 387, 390.
(3) [1892] 2 Q. B. 633, 636.
(4) (1885) 16 Q. B. D. 315.

The debtor appealed. The appeal was heard on May 20 and 23, 1938.

W. N. Stable K.C. and *Kingham* for the appellant. The judgment must be executed as a whole and not as to a part only. It is indivisible. The Divisional Court were in error in thinking that the judgment given in this case was in the wrong form. Order XXIV., r. 3, of the County Court Rules, 1936, provides for entry in the minute of the judgment or order of a note when the contract was entered into or the debt or obligation incurred before August 2, 1935; and the minute of the judgment or order is the entry made by the Registrar in the books of the Court in regard to any judgment or order. It is that record of the judgment that is referred to in Order XXIV., r. 3, and not the judgment itself.

So far as the debts were incurred here before August 2, 1935, the judgment is not a personal judgment but binds her property only. The result is that the bankruptcy notice is bad. It cannot include two judgments and the single judgment to which it relates is in part not the proper subject of a bankruptcy notice. The Court cannot go behind the judgment and ignore the part of the debt incurred before August 2, 1935. The bankruptcy notice is bad because it is embarrassing. The authorities cited by the Divisional Court do not really bear on this question. Proviso (ii.) to s. 2 of the Bankruptcy Act, 1914, does not apply. The bankruptcy notice is also misleading: *In re A Judgment Debtor* (1): compare *Forster* v. *Baker.* (2)

[They also referred to *In re Steel Wing Co.* (3)]

V. R. Aronson and *Rainsford-Hannay* for the respondent. The order of the Registrar was made in the right form. It accords with Form 138 of the forms attached to the County Court Rules, 1936. The Court is not entitled to go behind the judgment: *In re Easton.* (4) The question here really turns on the construction of s. 4, sub-s. 1 (*c*), of the Law

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(1) [1908] 2 K. B. 474.
(2) [1910] 2 K. B. 636.
(3) [1921] 1 Ch. 349.
(4) (1893) 10 Morr. 111.

Reform (Married Women and Tortfeasors) Act, 1935. Unless the bankruptcy notice is rendered invalid by reason of the judgment debt in respect of which it is issued including a debt incurred before that Act was passed, the appellant's case must fail. Sect. 4, sub-s. 1 (*c*), prevents a judgment in respect of a debt incurred by a married woman before the passing of the Act from being enforced in bankruptcy. It is contended that the issue of a bankruptcy notice is not an enforcement in bankruptcy but a step to put the creditor in a position to enforce the debt in bankruptcy.

[SIR WILFRID GREENE M.R. In the days when the Court of Chancery granted injunctions against the enforcement of judgments in other courts, could not an injunction have been granted on the issue of a bankruptcy notice to prohibit the enforcing of the judgment in bankruptcy ?]

An injunction might have been granted but only on the ground that its issue was a step to bring into existence an act of bankruptcy. It is necessary to consider what is meant by the word "enforced." A bankruptcy notice requires the debtor either to pay or satisfy his debt and says that in default he will have committed an act of bankruptcy on which bankruptcy proceedings may be taken. That being so, it cannot be said that the issue of the bankruptcy notice is a step in the bankruptcy proceedings and therefore it is not a step to enforce the judgment in bankruptcy.

"Enforce" is defined in the Oxford Dictionary as being to compel the observance. All the definitions hold the idea of exerting force to bring about some act. When the debtor obtains the issue of a bankruptcy notice, his object is either to get payment or to put the debtor in the position of having committed an act of bankruptcy. In order to enforce a judgment in respect of a debt in bankruptcy the debtor must be placed in the position, "pay or you will be adjudicated a bankrupt." The Bankruptcy Rules, r. 140, provided for the endorsement on a bankruptcy notice of the statement mentioned above.

[SIR WILFRID GREENE M.R. referred to *In re a Bankruptcy Notice.* (1)]

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(1) [1907] 1 K. B. 478.

Fletcher Moreton L.J. there said (1): " In my judgment "an application for a bankruptcy notice is not a method of "enforcing a judgment." He was construing the meaning of the words " enforced in the same manner as a judgment " in s. 12 of the Arbitration Act, 1889, but it affords strong support for the respondent's contention in this case.

[Scott L.J. Light is thrown on the question by comparing s. 1 (*d*) and s. 4, sub-s. 1 (*c*), of the Act of 1935.]

There is nothing in the Act to prevent the issue of a bankruptcy notice in respect of a debt incurred before the Act was passed. It is only on further proceedings that the question would be raised as to the right to bring bankruptcy proceedings. *In re a Debtor* (2) assists the respondent. It shows that this is not the time to question the validity of the bankruptcy notice.

[No reply was called for.]

Sir Wilfrid Greene M.R. This is an appeal from a decision of a Divisional Court of the Chancery Division, which reversed the decision of the county court Registrar and made a receiving order against the debtor.

The debtor is a married woman, who had various transactions with the petitioning creditor. One of the purchases which she made from him was made before August 2, 1935, the date when the Law Reform (Married Women and Tortfeasors) Act, 1935, received the Royal Assent. That was a small purchase of a fur cape for a sum of 5*l*. 5*s*. Subsequently to the passing of the Act, she made other purchases, bringing her total purchases up to 77*l*. 5*s*. As against that, she had made two payments on account, one of 1*l*. on November 16, 1935, and one of 3*l*. on March 23, 1936, leaving a sum of 73*l*. 5*s*. owing. In January, 1937, proceedings were taken against her in the county court, and judgment was recovered for 73*l*. 5*s*., and 5*l*. 13*s*. 6*d*. costs. Embodied in that judgment was a sum in respect of the purchase made before the Act of 1935 came into force. Whether the whole 5*l*. 5*s*. should be treated as being included in that sum, or whether the payments on account had been, or ought to be, treated as having been appropriated towards the payment of that sum of 5*l.* 5*s.*, does not very much matter, because in any event there would be a sum left referable to that particular transaction.

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(1) [1907] 1 K. B. 482.

(2) [1917] 2 K. B. 60.

The petitioning creditor, not having received payment, applied for and obtained the issue of a bankruptcy notice, which is dated October 14, 1937. It is in the usual form, and requires payment of the sum of 78*l.* 18*s.* 6*d.*, with the ordinary alternatives. That notice was not complied with and a petition, based upon it, was duly presented. But the Registrar refused to make an order upon the ground that he was prevented from doing so by s. 4, sub-s. 1 (*c*), of the Act of 1935. That Act made married women liable as though they were femes soles in respect of various matters of contract, tort, and so forth. Also s. 1, para. (*d*), provided that they should be "subject to the law relating to bankruptcy and to "the enforcement of judgments and orders." Sect. 2 got rid of the separate property of married women. Accordingly, as from the passing of the Act the property of a married woman belongs to her as though she were a feme sole. Then there are certain provisions saving the validity and effect of antecedent restraints on anticipation.

Then s. 4, sub-s. 1, provides among other things as follows: "Nothing in this part of this Act shall . . . . (*c*) enable any "judgment or order against a married woman in respect of "a contract entered into, or debt or obligation incurred, "before the passing of this Act, to be enforced in bankruptcy "or to be enforced otherwise than against her property." It is said on behalf of the appellant that, inasmuch as part of the judgment in this case is referable to a debt incurred before the passing of the Act, the effect of the provision which I have read is to prohibit the enforcement in bankruptcy of the judgment. It is said in support of that proposition that the judgment is not divisible, and the mere presence in it of some part which is referable to a debt incurred before the Act is sufficient to make the whole unenforceable. If the other arguments of the appellant be right, it was not disputed that that was a correct proposition. We can, therefore, disregard the circumstance that the major part of this judgment was in respect of debts incurred after the passing of the Act; and we can treat it in exactly the same way as a judgment would fall to be treated if it were based entirely on debts incurred before the passing of the Act.

The judgment in the county court is before us; and it is in a form set out in the County Court Rules. The form of it, subject to a reference to a possible restraint on anticipation, is nothing more nor less than the ordinary form of judgment. It contains upon its face no reference to the fact that part of the judgment is referable to a debt incurred before the Act of 1935.

That leads me to mention in passing one observation in the judgment of the Divisional Court, with which I respectfully disagree. It was thought by the learned judges there that the order was in a wrong form, inasmuch as it contained no reference to that circumstance. In support of that view the learned judges referred to Order XXIV., r. 3, proviso (*a*), of the present County Court Rules. [His Lordship read the rule.] The learned judges in the Divisional Court, I think, did not notice that that direction is not a direction for the insertion of a paragraph referring to those matters in the order itself; but a direction that a note shall be made in the minute of judgment. The minute of judgment, of course, is not the judgment itself, but the minute which the Registrar enters in the County Court Book under r. 1 of Order XXIV. The object of the direction is not to insert in the order itself any reference to those matters. The object of inserting that reference in the minute in the book is obviously that it may serve as an aid to memory, and perhaps to ensure that, when the certificate of judgment, which is taken from the entry in the book, is applied for for the purpose of taking some step to enforce the judgment, the Registrar shall have before him the entry which it is provided shall bear on its face a warning with regard to those matters affecting the enforceability of the judgment.

In the present case, as I have said, there is nothing in the order dealing with those matters. Indeed, there was no need for there to be anything of that kind. The actual certificate did, in point of fact, have this upon it. It described the order, which was an order for payment by instalments of 10*l*. "Ordered first payment 31st March, 1937: separate "estate judgment." What precisely was intended to be referred to by that, I am not quite sure; but it rather looks as though, when the note was made in the county court book, it was intended to call attention to the fact that part of this judgment related to a debt incurred before the Act of 1935. However that may be, nothing, in my opinion, really turns on the form of the certificate or the entry in the book, because this is a question of statutory prohibition against the enforcement in bankruptcy of certain types of judgment. There is no necessity in the judgment itself to make any reference to those matters, because it is not the judgment that prevents the enforcement, but the express terms of the Act of 1935 itself.

The Divisional Court dealt with the matter, if I appreciate their judgment correctly, in this way. They took the view that the debt owing to the petitioning creditor was a good petitioning creditor's debt, because there was included in the sum payable under the judgment a sum of more than 50*l*. incurred since the passing of the Act of 1935. Regarding that as a good petitioning creditor's debt, they felt themselves able to disregard the circumstance that the order also included something which would not be a good petitioning creditor's debt and could not be taken into account in considering whether there was a good petitioning creditor's debt. Whether or not they thought that that analysis had the effect of making the bankruptcy notice valid, I am not quite clear. It is common to find cases where, a bankruptcy notice having been issued in proper form following the language of the judgment, when the petition is presented, the Court will scrutinize the debt on which the judgment was based; and it may go behind the judgment, in the sense that it may find that that debt is one which, in whole or in part, would not be a good debt for the purposes of bankruptcy proceedings. A simple case of that kind is the case of debts owing to moneylenders. The Court in those cases, on the hearing of the petition, is prepared, so to say, to scale down the petitioning creditor's debt. If the effect of scaling it down is to bring it below 50*l.*, there is no good petitioning creditor's debt at all. But if, after the objectionable part has been cut away from the judgment debt, there is an amount of 50*l.* or more left, then it is a good petitioning creditor's debt.

But those cases all proceed on the footing that the bankruptcy notice in those instances where the petition is based on a bankruptcy notice, was a good notice, and had nothing to do with the question of whether the bankruptcy notice itself was a good notice. It appears to me that the principles on which the Court acts when it scrutinizes a debt which is the basis of a petition in bankruptcy, are not applicable to the case of a bankruptcy notice. In other words, if the bankruptcy notice is bad, you cannot make it good by cutting away, so to speak, from the amount of the judgment on which it is based some objectionable part. The effect of saying that those principles did apply would, as it seems to me, be this: the Court would then be saying that a bankruptcy notice, mentioning the reduced sum, would have been a good bankruptcy notice. Logically in fact that must follow. That would be impossible in reality; because, if an amount mentioned in the judgment was scaled down by cutting away some objectionable part of it, the bankruptcy notice would be a bad bankruptcy notice, since it would not follow the terms of the judgment. Therefore, it seems to me the principles of those cases have no bearing on the matter of the validity of a bankruptcy notice. I am not quite clear whether the learned judges in the Divisional Court intended to apply those principles or not; or whether they were treating the bankruptcy notice as a good bankruptcy notice and considering whether or not, in accordance with the principles of those cases, they could scale the debt down, with a view to seeing whether there was left a good residuum, sufficient to found a petition.

The real point in the case in my judgment is: Aye or no was the bankruptcy notice a good notice? If it were something issued in the face of a statutory prohibition, it would be a bad notice; and it would not be possible, therefore, to found a bankruptcy petition upon it. The matter comes down to a very short point, as indeed Mr. Aronson in his careful argument agreed, on the construction of s. 4, sub-s. 1 (*c*), of the Act of 1935. If the issue of the bankruptcy notice is an enforcement in bankruptcy of the judgment debt, then admittedly the bankruptcy notice was bad. But Mr. Aronson contended that the mere issue of the bankruptcy notice is not a contravention of the provisions of para. (*c*) of sub-s. 1 of s. 4, which says that the judgment is not to be enforced in bankruptcy, because he says the issue of the notice is not an enforcement in bankruptcy, but is merely a step to put the creditor in a position where he can proceed to enforce the judgment by presenting a bankruptcy petition. In my opinion, that construction of the paragraph is much too narrow. A bankruptcy notice is something quite different to a letter of demand, or something of that kind. It is a proceeding provided for in the Bankruptcy Act and Rules thereunder; and it is a step, and in some cases a necessary step, in the enforcement in bankruptcy of a judgment, and non-compliance is an act of bankruptcy. The bankruptcy notice is issued by the Court. Application must be made for the notice to be issued; and in the event of refusal by the Registrar to issue a notice, there is a right to appeal to the Court. It seems to me that the creditor, when he applies for his bankruptcy notice (and in case of necessity appeals to the Court against a refusal to issue it) is enforcing in bankruptcy a judgment on which the notice is intended to be based. It is the first step in the enforcement in bankruptcy of the judgment. The application for, and the issue of the bankruptcy notice are both, to my mind, quite clearly proceedings in bankruptcy. The Bankruptcy Rules contain provisions with regard to them: and it is not without significance that Part 3 of those Rules is headed "Proceedings in Bankruptcy"; and the second fasciculus of Rules under that part is headed "Bankruptcy Notice."

I should have thought, if the question were asked whether the application for the issue of a bankruptcy notice and the issue of the bankruptcy notice, and everything which follows therefrom, is or is not an enforcing in bankruptcy of the judgment, there could only be one answer to that question.

It is, perhaps, useful to place side by side the provisions of para. (*c*) of sub-s. 1 of s. 4 and the provisions of para. (*d*) of s. 1, as was suggested by Scott L.J. in the course of the argument. Para. (*d*) of s. 1 is the provision which makes married women "subject to the law relating to Bankruptcy "and to the enforcement of judgments and orders." The pendant to that is para. (*c*) of sub-s. 1 of s. 4, which protects the married woman with regard to certain contracts. It seems to me that under para. (*d*) of s. 1, the married woman is made liable to have a bankruptcy notice served upon her, and liable to have put into operation against her the bankruptcy machinery by the creditor taking the first step of issuing that notice. It is para. (*d*) of s. 1 which exposes married women in general to that liability. It is para. (*c*) of sub-s. 1 of s. 4 which, in respect of certain contracts, saves them from that liability.

There is only one other matter to which I should refer. There is an authority in which there is a dictum of Moulton L.J. which might be thought to have some bearing on the present question. It is a case of *In re a Bankruptcy Notice.* (1) That was a case where an award had been obtained in an arbitration, and an order had been made by the Master on an application to enforce that award, directing that the judgment be entered in accordance with the award. That was something which at that time could not properly be done. Application having been made for the issue of a bankruptcy notice based upon that order, the application was refused by the Registrar; and the creditor appealed. The ground of the decision of this Court was that the order was a bad order, because it did not comply with s. 12 of the Arbitration Act, 1889; but on the contrary contained a provision that judgment ought to be entered, which was not permissible under that section.

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(1) [1907] 1 K. B. 478.

But Fletcher Moulton L.J. used certain language (1) which I must mention. Before doing so, I may point that that the language of s. 12 of the Arbitration Act of 1889 was: "An "award on a submission may by leave of the Court or a "judge be enforced in the same manner as a judgment or "order to the same effect." Moulton L.J. said (1): "The "only other question is as to whether the procedure under s. 4, "sub-s. 1 (*g*), of the Bankruptcy Act, 1883, is an enforcement "within the meaning of s. 12 of the Arbitration Act, 1889. "In my judgment an application for a bankruptcy notice is "not a method of enforcing a judgment. It is the commencement of proceedings of far wider effect, and is not intended "to be included in the words of s. 12 of the Arbitration Act. "Therefore, this order, even if we corrected it by striking "out the words inserted without jurisdiction, would not "entitle the creditor to the issue of a bankruptcy notice." There is one sentence in that paragraph which I have read which, taken out of its context, might appear to support the argument of the respondent in this appeal. But in my opinion it really does not help that argument, because the passage, when properly construed in its context, is merely an expression of the view of the learned Lord Justice on the meaning of the word "enforced" in s. 12 of the Arbitration Act, 1889. In that context he attributes to the word a rather more limited meaning. What we have to decide, however, is the meaning of the words "to be enforced in bankruptcy" in this particular Act, and in the context in which we find it. In my opinion the answer to that question is that the issue of a bankruptcy notice is a step in the enforcement of the judgment in bankruptcy. As the judgment is one which, by virtue of the element in it to which I have referred, cannot be enforced in bankruptcy, the bankruptcy notice founded upon it was bad and was a nullity ab initio. The result is that no act of bankruptcy was ever committed by

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(1) [1907] 1 K. B. 482.

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noncompliance with the notice; and the foundation of the petition is destroyed. The appeal must be allowed with costs.

SCOTT L.J. I agree.

CLAUSON L.J. I agree.

Appeal allowed.

Solicitors: *Rising & Ravenscroft, for Triggs, Turner & Co., Guildford; W. A. G. Davidson & Co.*

H. C. G.

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Distinguished. READ *v.* ASTORIA GARAGE [1952] 1 Ch. 637

BEATTIE *v.* E. & F. BEATTIE, LIMITED.

[1936. B. 4661.]

Company—Director—Claim that sums improperly paid by him to himself and to another out of company's funds—Representative action—Motion for stay of proceedings—Article containing reference to arbitration—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 20.

The Companies Act, 1929, s. 20, sub-s. 1, provides: "Subject "to the provisions of this Act, the memorandum and articles "shall, when registered, bind the company and the members "thereof to the same extent as if they respectively had been "signed and sealed by each member, and contained covenants "on the part of each member to observe all the provisions of the "memorandum and of the articles."

Held (affirming the decision of the Vice-Chancellor of the County Palatine Court of Lancaster on this point), that, even if a particular article of a private company was wide enough to make it apply to a dispute between the company and a member in his capacity of a director and provided for reference of such a dispute to arbitration, s. 20 of the Act did not give contractual force to the article in reference to such a dispute so as to constitute it, for the purpose of that dispute, a written agreement for submission to arbitration within s. 4 of the Arbitration Act 1889.

Hickman v. *Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch. 881, approved and applied.

APPEAL from the Vice-Chancellor of the County Palatine Court of Lancaster.

E. & F. Beattie, Ld., was incorporated on December 13, 1900, under the Companies Acts as a company limited by shares with a nominal capital of 4000*l.*, divided into 4000 shares of 1*l.* each, of which 3228 had been issued and were fully paid. Until the death of Frank Beattie, the husband of the plaintiff Margaret Jane Beattie, the issued shares of the company were held by Frank Beattie and the defendant Ernest Beattie in equal shares. Since the death of Frank Beattie the plaintiff had become and still was the registered holder of 1614 shares. The remaining 1614 shares were at all material times registered as to 1514 in the name of Ernest Beattie and 100 in the name of Edward Beattie, the son of Ernest Beattie.

Since the death of Frank Beattie the only directors of the company had been the defendant Ernest Beattie and the plaintiff. The defendant Ernest Beattie was the chairman of directors and the managing director and on July 18, 1935, Edward Beattie was appointed to be secretary of the company.

On December 30, 1936, the plaintiff commenced proceedings on behalf of herself and all other members of the company, except the defendant Ernest Beattie, against the company and Ernest Beattie, claiming a declaration that she, through or in company with her authorized agent, was entitled to inspect all books and accounts of the company including the minutes of the proceedings of the directors, and an injunction accordingly restraining the defendants from excluding her or her agent from such inspection, and a declaration that a resolution to increase the capital of the company to 14,000*l.* purported to be passed at a meeting of directors was invalid and an injunction accordingly.

After the pleadings in the action were delivered, the plaintiff applied by summons on December 22, 1937, for liberty to amend the writ and the statement of claim. The proposed additional claims to be added to the writ and statement of claim raising new issues were :—

(*a*) " An injunction restraining the company, its agents "and servants from paying to the defendant Ernest Beattie "and the defendant Ernest Beattie from drawing from the "funds of the company any sums by way of remuneration "not authorized by a resolution of the company in general "meeting."

(*b*) " An injunction restraining the defendants their servants "and agents from paying to or on account of the said Edward "Beattie or . . . . Fred D. Beattie out of the funds of the "company any sums by way of remuneration or otherwise "not authorized by the terms of a valid and subsisting service "agreement or by a resolution of the board of directors."

(*c*) " An order upon the defendant Ernest Beattie to repay "to the company all sums improperly paid to or on account "of or drawn by the defendant Ernest Beattie, the said "Edward Beattie or the said Fred D. Beattie out of the "funds of the company subsequently to the death of the said "Frank Beattie."

(*d*) "If necessary, an inquiry what sums have been paid or "drawn by the defendant Ernest Beattie the said Edward "Beattie and the said Fred D. Beattie or any of them out "of the funds of the company subsequently to the death of "the said Frank Beattie and how much of such sums have been "improperly paid or drawn."

The case made against the defendant Ernest Beattie in the suggested amendments to the statement of claim was, first, that in respect of the years ended April 5, 1934, to April 5, 1937, he had drawn sums amounting to 6186*l.* 7*s.* 5*d.*, purporting to be the sum of 20*l.* a week by way of salary and the residue as bonuses; and that there had at no time been any resolution, either of the company in general meeting or of the board of directors, authorizing these payments. Secondly, it was said that by a resolution of the directors at a meeting held on July 18, 1935, Edward Beattie was appointed secretary to the company at such remuneration as should from time to time be agreed between the directors, and at the same meeting it was resolved that he should be paid a commission of 5 per cent. on the profits of the business including the year 1932; and that otherwise no resolution had been passed fixing his remuneration. The defendant Ernest Beattie had nevertheless caused to be paid out of the funds of the company to or on account of Edward Beattie in respect of the years ended April 5, 1934, to April 5, 1937, sums amounting to 5454*l.* 11*s.* 8*d.*, of which the sums paid in respect of the years ending April 5, 1935, and April 5, 1936, were made up of salary at the rate of 20*l.* per week, bonuses and sums for income tax. The bonuses paid in these two years alone exceeded the commission of 5 per cent. on the profits of the company's business. Complaint was also made as to two small sums paid to Fred D. Beattie, another son of the defendant Ernest Beattie, and an employee of the company.

On December 30, 1937, the defendant Ernest Beattie gave notice of motion by which he moved that all further proceedings upon the summons taken out by the plaintiff

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on December 22, 1937, should be stayed until further order pursuant to s. 4 of the Arbitration Act, 1889, in view of the submission to arbitration contained in art. 133 of the articles of association of the defendant company.

Art. 133 of the company's articles of association provides: "Whenever any doubt, difference, or dispute shall arise "between any members of the company, or between the "company and any member or members (and for the purpose "of this article the word 'member' shall include any person "claiming through or under a member) touching the con-"struction of these presents, or any article herein contained, "or any provision or regulation to be substituted for or added "to the articles herein contained, or any of them; or the "conduct, affairs, business or interest thereof, or any act or "default of the directors, or any of them, the members of the "company respectively, shall not take proceedings at law in "respect of such doubt, difference, or dispute, but the same "shall be referred to two arbitrators or their umpire, pursuant "to and so with regard to the mode and consequences of the "reference, and in all other respects to conform to the provi-"sions in that behalf contained in the Arbitration Act, 1889, "or any then subsisting statutory modifications thereof; and "these presents may be made a rule of any decision of the "High Court of Justice."

The Vice-Chancellor said that the action so far as the amendments in question were concerned was in substance an action by and on behalf of the company against a director, or possibly managing director, for breach of trust as an agent. That seemed at once to raise a question on the construction of art. 133, of which the material words were "Whenever "any doubt, difference, or dispute shall arise between . . . . "the company and any member or members . . . . touching ". . . . any act or default of the directors or any of them ". . . ." Such an article should be construed strictly. It did not follow that all the members would be directors or that the directors would necessarily be members, as a director might act before acquiring his qualification shares. That being so, it would be giving a very liberal construction to art. 133 to hold that it covered any doubt, difference or dispute between the company and any member or members in his or their capacity as directors; and it could not be so read. It was an article which dealt with disputes arising between the company or the members in their capacity of members. If that construction was right, there was in this case no agreement to submit to arbitration the matters raised by the proposed amendments.

But assuming that art. 133 did apply to such a dispute, a very difficult question arose as to the effect to be given to an article of this kind having regard to s. 20 of the Companies Act, 1929, which provided in sub-s. 1: "Subject to the "provisions of this Act, the memorandum and articles shall, "when registered, bind the company and the members thereof "to the same extent as if they respectively had been signed "and sealed by each member, and contained covenants on "the part of each member to observe all the provisions of "the memorandum and of the articles."

That section, which appeared originally in the Companies Act, 1862, had given rise to a number of decisions which were difficult to reconcile. He had been referred to *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association* (1), where Astbury J. reviewed the cases with great care. The question seemed to be whether art. 133 properly constituted a contract between the company and Ernest Beattie in his capacity of director, because he was also a member. There seemed no doubt that articles of association did not in themselves constitute a contract between a company and a director: *In re Wheal Buller Consols* (2) and *In re New British Iron Co.* (3)

If his interpretation of the authorities was right, he considered that he was bound to hold that art. 133, having the effect given to it by s. 20 of the Companies Act, 1929, did not constitute an agreement between the company and the defendant director in his capacity as director, even though he was a member of the company. He would therefore allow the amendments in the statement of claim, the plaintiff paying the costs of the application and the costs of or occasioned by the amendment, and the motion would be dismissed with costs.

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(1) [1915] 1 Ch. 881.
(2) (1888) 38 Ch. D. 42.
(3) [1898] 1 Ch. 324.

The defendant Ernest Beattie appealed. The appeal was heard on June 1 and 2, 1938.

Cleveland-Stevens K.C. and *R. A. Forrester* for the appellant. The Vice-Chancellor was wrong in refusing a stay of the proceedings under s. 4 of the Arbitration Act, 1889, pursuant to the arbitration clause contained in art. 133 of the company's articles of association. This is really a family squabble between the plaintiff, who holds half the shares of the company, and the defendant and his son, who hold the remaining half. Further, there are only two directors, the plaintiff and the defendant, and the chairman has no casting vote; and at a general meeting, if a poll was demanded, there would be the same division of voting power and again no casting vote. Therefore on a matter on which the plaintiff and defendant disagree there is a complete deadlock. The questions it is sought to raise by the amendments to the statement of claim relate to payments made by the defendant to himself as managing director and to his son as secretary, and it will be said that these payments were justified by an established practice taken together with the resolutions passed. The arbitration clause, art. 133, relates to disputes between members of the company or between the company and any member or members. Further, one of the subject-matters of such a dispute is "any act or default of the directors or any "of them." It is contended therefore that the article applies directly to the present case and it is immaterial whether it is regarded as a dispute between members or as a dispute between the company and a member. An article which deals with the rights of directors or managing directors constitutes a contract not only between the members inter se but also between members and the company: *Salmon* v. *Quin & Axtens, Ld.* (1)

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(1) [1909] 1 Ch. 311; [1909] A. C. 442.

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[SIR WILFRID GREENE M.R. That was a case where the plaintiff's right as member was being enforced.]

So here the defendant as a member is asserting his right to have a question in regard to his acts as a director referred to arbitration. He is asserting a right common to all members, and a recognized subject-matter to which the arbitration clause applies is the act or default of a director. This is not a case where the defendant is asking for the benefit of some provision in his capacity of director, but he is seeking to assert a right common to him and every other member of having the particular subject-matter referred to arbitration. The article constitutes a contract of which the defendant is entitled to the benefit by virtue of s. 20 of the Companies Act, 1929. *Salmon* v. *Quin & Axtens, Ld.* (1) is of great importance, because it shows that whether the dispute here be regarded as one between members inter se or as one between the company and the member, art. 133 applies. In *Eley* v. *Positive Government Security Life Assurance Co.* (2) the plaintiff was employed by the company as solicitor, but he was not a member of the company, he could therefore only enforce an article dealing with his employment in so far as it was embodied in his contract of employment. The root distinction here is that the defendant as a member seeks to enforce art. 133. It is not as if he was claiming something as director to which no ordinary member would be entitled. The defendant is not relying on his being a director but claiming as a member to have a dispute as to the acts or defaults of himself as director determined by arbitration, and the subject-matter of the dispute comes directly within art. 133.

[SIR WILFRID GREENE M.R. The dispute here is between the company or a member of the company and a servant of the company.]

A member is not less a member because he happens to be a director. If any limit is to be placed on art. 133 it must be by limiting the class of subject-matter to which it relates and not by limiting the class of disputants: see *Piercy* v. *Young*. (3)

(1) [1909] 1 Ch. 311.

(2) (1876) 1 Ex. D. 20.

(3) (1879) 14 Ch. D. 200, 204, 210.

[SIR WILFRID GREENE M.R. Does not s. 20 of the Companies Act, 1929, operate only to give the articles of association a contractual effect between members of the company as such ?]

It is submitted that as a result of the effect given to art. 133 by s. 20 of the Act, a member binds himself to go to arbitration in respect to matters as regards which he has a relation to the company other than that of a member ? The shareholder is bound as an individual, and the only limit to the contractual relationship is that he is bound only as regards matters that affect him as a shareholder : see the line of cases culminating in *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association.* (1)

[They also referred to *Imperial Hydropathic Hotel Co., Blackpool* v *Hampson.* (2)]

R. F. Roxburgh K.C. and *Harold Brown* for the respondent. The contention on the construction of art. 133 that any limitation on its effect must be in regard to the subject-matter of the dispute and not in regard to the disputants is unsound. That may be true when the disputants are specified persons, but not when, as here, they are described as members of a class. Here the words " in the capacity of members " should be read into art. 133. There is no other limit which can be given to s. 20 of the Act of 1929 in construing it, and that is what is done in practice, as was indicated by Astbury J. in *Hickman's* case. (3)

[SCOTT L.J. Do you say that the word " member " in art. 133 can have no wider meaning than it does in s. 20 ?]

Yes. In this connection *Isaacs* v. *Chapman* (4) is directly applicable to show that in the article " member " must be construed as meaning " member as such." Further, when art. 133 is examined it is clear that " members " and " directors " are contrasted.

Again the subject-matter of the dispute here is payment by a director to himself and to another. Therefore the dispute is whether what the defendant did as a director was lawful. If therefore art. 133 is to be treated as applying in such a case, there must be an agreement between the director and the company to refer his conduct as director to arbitration, otherwise the case is not within s. 4 of the Arbitration Act, 1889.

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(1) [1915] 1 Ch. 881.
(2) (1882) 23 Ch. D. 1.
(3) [1915] 1 Ch. 881, 903.
(4) (1916) 32 Times L. R. 183.

In fact, however, no such contract exists in law, for such a contract does not arise by the application of s. 20 of the Companies Act, 1929. The conduct of a director is involved, and that is not a matter concerning the rights of members only, and is not therefore within the article: see *Hickman's* case. (1) That is Astbury J.'s conclusion, and he arrives at it in seeking to reconcile earlier decisions. No right extraneous to the right of a member as such is involved as a result of the contractual effect given to art. 133 by s. 20: see also *Eley's* case (2) and *Browne* v. *La Trinidad.* (3) In *Eley's* case (2) the plaintiff was a member of the company at the date when the dispute arose, and those two cases are clear authority that a person who happens to occupy a position in regard to a company other than that of member cannot acquire any additional right in respect of that position by becoming a member: see also *In re New British Iron Co.* (4)

Lastly, the Court ought in any case to exercise its discretion by refusing the application for a stay by reason of art. 133. The action has in any case to continue in regard to the other matters raised by the statement of claim and the issues involved here are mainly issues of law.

Cleveland-Stevens K.C. replied and referred to *Willesford* v. *Watson* (5) and the Arbitration Act, 1934, s. 8.

SIR WILFRID GREENE M.R. This is an appeal from the decision of the Vice-Chancellor of the County Palatine of Lancaster which arises out of an action brought by Mrs. Margaret Jane Beattie against a company called E. and F. Beattie, Ld., and Mr. Ernest Beattie. The company is a private company, and the action is brought by the plaintiff

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(1) [1915] 1 Ch. 881, 897, 900, 903.

(2) 1 Ex. D. 20.

(3) (1887) 37 Ch. D. 1.

(4) [1898] 1 Ch. 324.

(5) (1873) L. R. 8 Ch. 473.

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in her representative capacity as shareholder. The total number of issued shares of the company is 3228 ordinary shares. Of those shares the plaintiff holds 1614, which is exactly half. The remainder are held as to 1514 by the defendant, Ernest Beattie, and as to 100 by his son, Edward Beattie, who is not a party to the action. There are two directors of the company, Mrs. Beattie and the defendant, Ernest Beattie, who is chairman but has no casting vote.

Disputes having arisen, Mrs. Beattie issued her writ on December 30, 1936, and the indorsement related to two matters: (1.) a question of her right to inspect the books and accounts: and (2.) a question as to a purported increase of capital and an allotment of new shares. With regard to that latter question, there were two subsequent amendments. So far as that part of the action is concerned, no question arises on this appeal. The action is continuing on those points.

On December 22, 1937, the plaintiff applied by summons for leave to amend her statement of claim and her writ. The nature of the amendments which she desired to make was, shortly, as follows. She alleged that the defendant, Ernest Beattie, had paid to himself and to Edward Beattie certain sums by way of remuneration which, under the regulations of the company, he was not entitled to pay. There is no allegation of any bad faith or anything of that kind in respect of the payments. They are merely payments of remuneration which are said not to have been justified.

When the application for leave to amend was made, Ernest Beattie applied under s. 4 of the Arbitration Act to have that part of the action stayed pursuant to an arbitration clause contained in the articles of association. The notice of motion was in the ordinary form. It asked for the action to be stayed, so far as it related to the new matters, proposed to be litigated, pursuant to s. 4 of the Arbitration Act. Then it went on: "The plaintiff"—that is, Mrs. Margaret Beattie— "and the defendants"—that is, the company and Mr. Ernest Beattie— "having under the submission contained in art. 133 "of the articles of association of the company agreed that all "disputes arising between the company and any member or "members touching"—various matters, which I will deal "with when I come to read the article — "should be referred "to arbitration."

It is not suggested that there is any objection to the application on the ground of a step in the action having been taken, this new matter being treated, for the purpose of s. 12 of the Arbitration Act, as in effect a new action. The learned Vice-Chancellor held that the application ought not to succeed. He accordingly dismissed it and this appeal ensued.

As I have said, Mr. Ernest Beattie is, and was at all material times, a director of the company and it is against him, in his capacity as director, that these claims are made. It is as a director in charge of the company's funds that he is responsible for their proper application, in accordance with the regulations which govern the company. It is in that capacity, therefore, that the action is brought against him.

The claim which the plaintiff is seeking to enforce in the action—I am now only dealing with the new matter which it is sought to introduce—is, and must be, in a representative action of this character, a claim of the company itself, because a minority shareholder suing in a representative action is suing to enforce rights of the company. The reason the action takes that form is that the minority shareholder is not in a position to see that the action is brought in the name of the company itself to enforce the company's rights. Nevertheless, the action is, in reality, an action to enforce the rights of the company and of nobody else. The essence of the claim is that the plaintiff is seeking to enforce the company's right to recover from Mr. Ernest Beattie moneys of the company, which, as it is alleged, have been paid away by him. The company, of course, is a necessary defendant because the order, if an order is made, will be an order for payment to the company, the moneys being the company's moneys.

The arbitration clause contained in art. 133 is as follows [His Lordship read the article]. There was some question as to the accuracy of the print which is before us, where it uses the words "the members of the company respectively, shall "not take proceedings." It was suggested that the "of" should be either "and" or "or." I do not think that it matters whether this is so or not.

The learned Vice-Chancellor dealt with the matter in this way. He held, first, that on the true construction of the article this present dispute did not fall within it. Secondly, he held that, if that be wrong as a matter of construction, the present appellant, Mr. Ernest Beattie, cannot rely on this article as constituting a contract between himself and the company, and that, therefore, it cannot be relied on as a submission to arbitration between him and the company for the purpose of s. 4. Lastly, he expressed his view on the question of discretion, but in view of his decision it was not necessary for him to exercise his discretion in the matter.

The way in which the matter is put on the first question, that of construction, is this. It is said on behalf of the plaintiff, and it was so held by the learned Vice-Chancellor, that in the phrase: "Where any doubt, difference, or dispute shall arise "between any members of the company, or between the "company and any member or members" the words "any "member or members" must be construed as subject to the "qualification" in his or their capacity as member or members." That means, as a matter of construction, that a disputant who happens to be a member, but is disputing in his capacity as director, will be excluded from the class of disputant with which this clause is concerned.

It is argued on behalf of the appellant, on the other hand, that this is not what the language really means. That a member is a member, and there is no distinction to be drawn for this purpose between his capacity as a member and his capacity as an individual.

I do not myself find it necessary to resolve what appears to be a rather subtle question. It may be just to say that on construction the word "members" in this clause means "members in their capacity as members," that is, excluding any relationship which does not flow from the membership itself. It may mean that or it may not, and I prefer to leave that matter without any expression of opinion on my part,

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because, in my judgment, there is a quite clear answer to this present appeal in the second matter with which the learned Vice-Chancellor dealt.

To bring himself within s. 4 of the Arbitration Act the appellant must point to a written agreement for submission. For that reason it will not be sufficient for him to rely on an agreement appointing him director which is merely to be inferred from conduct, even if in such an agreement a term corresponding to art. 133 ought to be imported. An agreement so extracted from the general relationship of the parties would not be a sufficient submission within s. 4.

The appellant, accordingly, seeks to find in the articles themselves a contract to which he is a party giving him the right to demand an arbitration in the present circumstances. I cannot find that contract. The appellant must rely on s. 20 of the Companies Act, 1929, which gives to articles of association a contractual force. That section provides: "(1) Subject to the provisions of this Act, the memorandum "and articles shall, when registered, bind the company and "the members thereof to the same extent as if they respectively "had been signed and sealed by each member, and contained "covenants on the part of each member to observe all the "provisions of the memorandum and of the articles."

Mr. Cleveland-Stevens says: Here is a member—namely, Mr. Ernest Beattie. Here is an article which provides that a dispute between the company and a member shall be referred to arbitration. It covers, among other things, a dispute relating to an act or default of a director. And he says that what he is seeking in the present case to do is to enforce that right as a member under that article and not any right as a director; that he has a right, and all other members have a right, when they find the company disputing with a director, to insist on that dispute being referred to arbitration. Mr. Cleveland-Stevens says that the case must be treated as though the circumstance that the appellant happens to be a director is immaterial. He says that it is quite immaterial that the member who is demanding arbitration is himself the member attacked.

In my judgment, that argument is based on an incorrect view both as to the effect of the article and as to the effect of s. 20 of the Companies Act. The question as to the precise effect of s. 20 has been the subject of considerable controversy in the past, and it may very well be that there will be considerable controversy about it in the future. But it appears to me that this much, at any rate, is good law: that the contractual force given to the articles of association by the section is limited to such provisions of the articles as apply to the relationship of the members in their capacity as members. I do not think, in saying that, that I am in any way departing from or extending (and it certainly is not my intention to depart from or extend) certain observations of Astbury J. in the well-known case of *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association*. (1) In that case Astbury J. made a careful review of all the decisions, and he expressed his conclusions with regard to them in this way. He referred to *Eley* v. *Positive Life Assurance Co., Ld.* (2), and certain other cases, and pointed out (3) that those decisions amounted to this: "An outsider to whom rights purport to be given by the articles "in his capacity as such outsider, whether he is or subsequently "becomes a member, cannot sue on those articles treating them "as contracts between himself and the company to enforce "those rights. Those rights are not part of the general regula-"tions of the company applicable alike to all shareholders "and can only exist by virtue of some contract between such "person and the company." Then, again, he said (4): "no "right merely purporting to be given by an article to a person, "whether a member or not, in a capacity other than that of a "member, as, for instance, as solicitor, promoter, director, "can be enforced against the company."

With those two statements I respectfully agree. They are statements with regard to the true construction and operation of s. 20, and they have the result in the present case of preventing that section from giving contractual force to the article as between the company and its directors as such.

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(1) [1915] 1 Ch. 881.
(2) 1 Ex. D. 20.
(3) [1915] 1 Ch. 897.
(4) Ibid. 900.

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It is to be observed that the real matter which is here being litigated is a dispute between the company and the appellant in his capacity as a director, and when the appellant, relying on this clause, seeks to have that dispute referred to arbitration, it is that dispute and none other which he is seeking to have referred, and by seeking to have it referred he is not, in my judgment, seeking to enforce a right which is common to himself and all other members. He is seeking to enforce a quite different right. I will explain what I mean. Let me assume that this article on its true construction entitles any member of the company to say to the company, when it is in dispute with a director: "You, the company, are bound by "your contract with me in the articles to refer this dispute "to arbitration, and I call upon you so to do." That is the right, and the only right in this respect, which is common to all the members, under this article. If that were the right which the appellant was seeking to exercise, there might be something to be said for that argument, but, with all respect to the able argument of Mr. Cleveland-Stevens, it appears to me that that is not at all the right which the appellant is seeking to enforce. He is not seeking to enforce a right to call on the company to arbitrate a dispute which is only accidentally a dispute with himself. He is asking, as a disputant, to have the dispute to which he is a party referred. That is sufficient to differentiate it from the right which is common to all the other members of the company under this article, which I have tried to define. That right is one which a member might find very great difficulty in enforcing in the Courts, because it concerns a matter relating to the internal management of the company, with which the Courts will not, in general, interfere.

BUT.

But quite apart from that consideration, the two rights are, in my judgment, perfectly distinct and quite different—the general right of a member as a member and the right which the appellant as a party to the dispute is seeking to enforce. Indeed, Mr. Cleveland-Stevens agrees that his argument really amounted to saying that the present application is in essence the same as proceedings brought by Mr. Ernest Beattie, as a shareholder, to restrain the company from litigating and to obtain a mandatory order on the company to go to arbitration. But that is a very different thing from what he is now seeking since his claim, as I have said, is to insist on a reference of his own dispute.

That seems to me to deal conclusively with the matter, and I do not think that anything which I have said in any way differs from the reasons which the learned Vice-Chancellor has given on this part of the case. When he says, as he does say, after examining the cases: "This art. 133 having the "effect given to it by s. 20 of the Companies Act, 1929, does "not constitute an agreement between the company and the "defendant director in his capacity as director, even though "he is a member of the company," his conclusion, in my opinion, is perfectly right.

The only other matter which has been discussed is the question of discretion. The learned Vice-Chancellor appears to indicate the view that, had he been in favour of the appellant on other matters, he would have exercised his discretion in his favour. That has been touched on in the argument before us, but having regard to the grounds on which I have rested my decision it is unnecessary for me to deal with it. But from that I do not wish it to be in any way thought that I should necessarily have taken the same view on the matter of discretion as the learned Vice-Chancellor appears to have taken.

In the result the appeal must be dismissed.

SCOTT L.J. I agree with what the Master of the Rolls has said as to the scope of No. 133 of the company's articles of association in the light of s. 20 of the Companies Act, and as to the application to that article of the provision of s. 4 of the Arbitration Act that if any party to a submission, or any person claiming through or under him, begins any legal proceedings against any other party to the submission, then application can be made to the Court to stay such proceedings.

I agree that this appeal should be dismissed, for the reasons which the Master of the Rolls has given, but I should like to add expressly that I should not regard this particular dispute

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as one which ought to be taken from the Court and referred to arbitration, even if our decision on the question of the interpretation of the particular article were wrong.

CLAUSON L.J. I agree with all that has fallen from the Master of the Rolls and Scott L.J. and, in those circumstances, I have nothing to add.

Solicitors: *Cunliffe & Airy, for Lee, Scott, Start & Mottershead, Manchester; T. J. Smith & Son, Liverpool.*

H. C. G.

In re F. B. WARREN.

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March 14, 21;
April 4.

Ex parte A. M. WHEELER *v.* THE TRUSTEE IN BANKRUPTCY.

[No. 3 of 1937.]

Bankruptcy—Loan for building transactions—Guarantee of builder's overdraft—Moneys received by builder to be paid into lender's banking account and applied in reduction of overdraft—Payment of money received into lender's bank on same day as receiving order but before order actually made—Equitable assignment—" Before the date of the " receiving order "—Judicial act—Non-judicial act—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 45, *proviso.*

A., a builder, was in 1937 engaged in certain building operations. From time to time he had been financed by one W. in these transactions; the arrangement being that W. should guarantee with A.'s bank his overdraft at that bank and make him small cash advances from time to time. Part of the arrangement entered into was to the effect that all moneys received by A. for houses erected by him or arising on a mortgage transaction in connection with houses erected should be paid over to a certain firm of solicitors originally acting as solicitors for W., who were to act also for A. The solicitors—after certain deductions—were to pay the balance to the credit of W.'s account at his own bank, which was then to be applied by W. in reduction of A.'s overdraft at his bank in relief of W.'s guarantee.

A., having completed the houses, mortgaged them to a building society. The solicitors received the amount advanced and, after making various payments and deductions out of the sum so received under the terms of the arrangement, were left with a balance of 963*l.* 9*s.* 3*d.* in their hands. On Monday, March 15, 1937, before 11 A.M., they paid this amount by cheque to the credit of W.'s banking account.

On the same day, but some hours later, after the time of payment to the bank, a receiving order was made against A., and on March 18, 1937, he was adjudicated a bankrupt. Neither W. nor the solicitors had any notice of the fact that bankruptcy proceedings were pending at the time when the moneys were received by the solicitors nor when they were dealt with by them.

The trustee in bankruptcy having applied in the county court by motion for an order that this sum of 963*l.* 9*s.* 3*d.* formed part of the bankrupt's estate, it was ordered that W., the respondent to the motion, should pay over this sum to him as trustee.

From this decision W. appealed:—

Held (reversing the order of the county court judge), that he

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was wrong in holding that the moneys were the bankrupt A.'s own property to deal with as he wished. The arrangement between A. and W. constituted a good equitable assignment of the moneys so received, and hence could not be dealt with otherwise than in accordance with the arrangement between A. and W. The moneys were not the property of the bankrupt A., and the payment into W.'s account by the solicitors could not be impeached.

Held also, that as regards the time of paying in, namely before the receiving order was actually made but on the same day, a question arose on the true meaning of the words in the proviso (i.) to s. 45 of the Bankruptcy Act, 1914: "that the payment " . . . . takes place before the date of the receiving order."

The result of the authorities on this question showed that in cases of competition in point of time between a judicial and a non-judicial act, the rule that the judicial act should be given precedence must prevail, and the application of the rule therefore gave precedence to the judicial act.

The making of the receiving order (being a judicial act) must therefore in accordance with the rule be referred back to the earliest moment of the day of March 15, 1937, and the actual payment into the bank (being a non-judicial act) could not be treated as having been made before it.

Decision of the county court judge reversed on the first point, but affirmed on the second point.

MOTION IN BANKRUPTCY.

These proceedings concerned a claim by the trustee in the bankruptcy of one F. B. Warren that a certain sum of money, paid by a firm of solicitors acting on his behalf on the same day that a receiving order was made against him but a few hours before the order was made, into a bank to the credit of one A. M. Wheeler, who had financed the bankrupt in certain building transactions, was void as against the trustee in bankruptcy by virtue of s. 38 of the Bankruptcy Act, 1914, and that such sum formed part of the bankrupt's estate and should be paid over to the trustee accordingly.

The matter came before His Honour Judge Clements, sitting in the Rochester County Court, by way of motion on behalf of the trustee in bankruptcy; and by an order of the learned county court judge dated January 19, 1938, it was declared that the payment above referred to was void as against the applicant, the above named trustee, and that the said sum formed part of the bankrupt's estate. From this decision the above named A. M. Wheeler appealed to the Divisional Court in Bankruptcy.

The following statement of the facts is taken from the judgment of the Court, which was read by Luxmoore J.

The bankrupt was adjudicated bankrupt on March 18, 1937, on a petition presented on February 16, 1937, in respect of an act of bankruptcy which related back to February 4, 1937, the receiving order having been made on March 15, 1937.

There is no clear-cut finding of facts by the county court judge, but the evidence, which was by affidavit supplemented by cross-examination, shows that immediately before the date of the receiving order the bankrupt was, and had for some time before that date, been carrying on business as a builder. In the course of his business he had been engaged in the erection of houses on a site in Ramsden Road, Orpington, in the county of Kent, forming part of a building estate belonging to Morris Securities, Ld. The appellant Wheeler was the controlling personality of this company, holding practically the whole of its issued share capital. There had been at least one earlier transaction between the bankrupt and the appellant with regard to the erection of buildings on an estate at Bexley Heath which also belonged to the company, but it is unnecessary to refer to the details of this transaction; indeed the learned county court judge has said that he was unable to ascertain what were its precise terms. So far as the Ramsden Road site is concerned the bankrupt agreed to purchase that site from the company and arranged to build four houses on it. The appellant agreed to assist in finding the necessary finance to enable the bankrupt to carry out his part of the arrangement. The arrangement made was that the appellant should guarantee in favour of the Westminster Bank, Ld., Orpington branch, an overdraft on the bankrupt's account with the bank, and in addition make a small cash advance to the bankrupt. It was a material term of the arrangement between the appellant and the bankrupt that all moneys to be received by the bankrupt in respect of the houses built on the site and of the site itself should be paid to a firm of solicitors named Hardman & Sons. This firm acted originally as solicitors for the appellant, and it was a further term of the arrangement that they should also act as the solicitors for the bankrupt. When the houses were erected the land and houses were either to be sold to purchasers or were to be mortgaged by the bankrupt to a building society; and the purchase money or the mortgage money, as the case might be, was to be paid to the solicitors, who were to deduct from it, first, the purchase price for the site payable to the company, and pay the sum so deducted to the company, and then to retain the amount of their costs. After these deductions they were to pay the balance of the purchase money or mortgage money, as the case might be, to the credit of the appellant's account at the Westminster Bank. The moneys so paid were to be applied by the appellant in reduction of the bankrupt's overdrawn account at the bank in relief of the appellant's guarantee to the bank. There is some doubt whether this arrangement was made before the building operations by the bankrupt on the Ramsden Road site commenced or whether it was made afterwards. In any event it was made long before the buildings were completed and also before the transaction with the building society hereinafter mentioned was entered into. The procedure described was followed with regard to the first of the four houses built by the bankrupt on the Ramsden Road site. The bankrupt subsequently completed the remaining three of the houses on the site and mortgaged them to the Kent Reliance Permanent Benefit Building Society for 1400*l.* Of this sum, 1366*l.* 0*s.* 9*d.* was paid to the solicitors, Messrs. Hardman & Sons, on March 13, 1937, being the amount of the advance less certain fees and charges deducted by the building society. As part of the transaction a conveyance was executed by the company in favour of the bankrupt in consideration of the purchase price, 337*l.* 10*s.* This was paid by Hardman & Sons out of the 1366*l.* 0*s.* 9*d.* Hardman & Sons, after payment of the 337*l.* 10*s.*, were left with the sum of 1028*l.* 10*s.* 9*d.*; from this they deducted 63*l.* 1*s.* 6*d.* in respect of their own costs and disbursements, leaving the sum of 963*l*. 9*s*. 3*d*. in their hands. The money was received by Hardman & Sons on a Saturday morning and paid by them to the credit of the firm's clients' account. An entry was made in the firm's books in favour of the bankrupt of 963*l*. 9*s*. 3*d*., but the solicitors state that having regard to the arrangement they could not and would not have paid any part of the 963*l*. 9*s*. 3*d*. to the bankrupt even if he had demanded payment. On Monday, March 15, 1937, before 11 A.M., the solicitors paid the 963*l*. 9*s*. 3*d*. by cheque on the firm's clients' account to the Westminster Bank, Ld., Broadstairs, with a request to the bank to pay that sum to the appellant's account at the Orpington branch of the bank. The 963*l*. 9*s*. 3*d*. is the sum which the learned county court judge has ordered the appellant to pay to the trustee in bankruptcy. On the same day, but after the time of payment to the bank, the receiving order was made. Neither the appellant nor the solicitors had any notice of the fact that bankruptcy proceedings were pending at the time when the moneys were received by the solicitors or when they were dealt with by them.

J. B. Blagden for the appellant. The appellant is protected by the Bankruptcy Act, 1914, s. 45; see (*a*) and the proviso (1); the payment in to his account by the solicitors is therefore valid. The material words in this section to be considered

(1) Bankruptcy Act, 1914, s. 45: "Subject to the foregoing provisions of this Act with respect to "the effect of bankruptcy on an "execution or attachment, and "with respect to the avoidance of "certain settlements, assignments "and preferences, nothing in this "Act shall invalidate in the case "of a bankruptcy—(*a*) Any payment by the bankrupt to any of "his creditors; . . . .

"Provided that both the following conditions are complied "with, namely—

"(i.) that the payment, delivery, conveyance, assignment, contract, dealing, or "transaction, as the case may "be, takes place before the date "of the receiving order; and

"(ii.) that the person (other "than the debtor) to, by, or "with whom the payment, "delivery, conveyance, assignment, contract, dealing, or "transaction was made, executed, or entered into, has not "at the time of the payment, "delivery, conveyance, assignment, contract, dealing, or "transaction, notice of any "available act of bankruptcy "committed by the bankrupt "before that time."

by the Court are those in the proviso: "before the date "of the receiving order." Here the word "date" means, it is submitted, the actual point of time when the receiving order was pronounced. As to the computation of time for the doing of an act, see two very old cases: *Anon.* (*Howard's Case*) (1); and *Armitt* v. *Breame.* (2)

In old times a trader could not charge or dispose of his property to the prejudice of his creditors: see the statute of 1570 (13 Eliz. c. 7). The first "protective" section was in the Act of 1825 (6 Geo. 4, c. 16): compare s. 3 of that Act.

As to the commutation in regard to time of fractions of a day, see *Thomas* v. *Desanges.* (3)

For conveyances by a bankrupt without notice being valid, see s. 81 of the above mentioned Act of 1825; then in a later Act, s. 12 of the Judgments Act, 1839 (2 & 3 Vict. c. 11).

On the question of time between the execution of a judgment and the issuing of a commission against the defendant making him a bankrupt, compare *Godson* v. *Sanctuary* (4), and the remarks of Denman C.J. For a case on the time of delivering out a fiat in bankruptcy as an operative instrument being "the date and issuing" within the statute 2 & 3 Vict. c. 29 (since repealed by 12 & 13 Vict. c. 106), see *Pewtress* v. *Annan.* (5) It is submitted that that case shows that a judicial act does not operate from the earliest moment of the exact day. Compare *Woodland* v. *Fuller.* (6)

For a later Act with a "protective section," see s. 133 of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106) (itself now repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869 (32 & 33 Vict. c. 83)). The word "date" has remained ever since 1849, and there is no authority on this point since that year.

For a somewhat analogous case on a similar point, compare the dictum of Lindley M.R. in *In re Clarke* (7), and also *Clarke* v. *Bradlaugh.* (8)

(1) (1699) 1 Lord Raym., 4th ed., 480.

(2) (1704) 2 Lord Raym., 4th ed., 1076, 1082.

(3) (1819) 2 B. & Ald. 586.

(4) (1832) 4 B. & Ad. 255, 260.

(5) (1841) 9 Dowl. 828.

(6) (1840) 11 Ad. & El. 859.

(7) [1898] 1 Ch. 336, 339.

(8) (1881) 8 Q. B. D. 63.

On the question whether under the arrangement there was an equitable assignment of the moneys received by Hardman & Sons from the building society or whether the money remained the property of the bankrupt, compare such a case as *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) for Lord Macnaghten's remarks, and see also *Cotton* v. *Heyl* (2); *Palmer* v. *Carey* (3); and the remarks of Maugham J. in *In re Gillott's Settlement* (4) on *Palmer* v. *Carey*. (3)

Norman E. Wiggins for the respondent. On the question of an equitable assignment, the passage in Lord Macnaghten's judgment in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) beginning "The language is immaterial if," etc., is relied on. No clear intention is expressed here. The case of *Palmer* v. *Carey* (3) is relied on. Compare also *Ex parte Hall* (5); and see *Holroyd* v. *Marshall* (6) and *Wilmot* v. *Alton*. (7)

Execution under a writ of fieri facias is a judicial act. The cases to which counsel for the appellant has referred seem to be cases of execution by the sheriff: and in some of those cases the act in competition with the sheriff's act was an act of bankruptcy, which is not a judicial act. [He referred to *Clarke* v. *Bradlaugh* (8); *Thomas* v. *Desanges* (9); and *Pewtress* v. *Annan*. (10)]

In re Clarke (11) was a case in which it was held that the Court in Lunacy has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of a lunatic which at the time of seizure is not in the custody of the court. In the supplement to Stroud's Judicial Dictionary, 2nd ed., p. 262, under the word "Date," is the passage: "'The word "Date" is much more commonly descriptive of "'a DAY than of any smaller division of time' (per Stormonth "Darling L.O., *Simpson* v. *Marshall*, 37 Sc. L. R. 316; 2 "Fraser 451)." Sect. 45 of the Bankruptcy Act, 1914 (12), does not come into operation unless the payment is made at least on the date of the receiving order.

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(1) [1905] A. C. 454, 462.
(2) [1930] 1 Ch. 510, 520.
(3) [1926] A. C. 703.
(4) [1934] Ch. 97, 109.
(5) (1879) 10 Ch. D. 615.
(6) (1861–62) 10 H. L. C. 191.
(7) [1897] 1 Q. B. 17.
(8) 8 Q. B. D. 63.
(9) 2 B. & Ald. 586.
(10) 9 Dowl. 828.
(11) [1898] 1 Ch. 336.
(12) See note (1) ante, p. 729.

J. B. Blagden in reply. The part of the appellant's case dealing with the point as to time was put under s. 45, para. (*a*), proviso i., of the Bankruptcy Act, 1914. (1) The Court must be satisfied that the respondent at the time of the bankruptcy was a creditor, and it is submitted that for the purposes of the Bankruptcy Act, 1914, a contingent creditor is a creditor. It is true that, strictly speaking, *In re Paine* (2) dealt with another section of the Act, namely s. 48, but the meaning of the word "creditor" in that section must hold good for the whole of the Act. If that submission is right the question as to time becomes extremely important. This part of the argument for the appellant is based entirely upon the doctrine of Lord Coleridge C.J. in *Clarke* v. *Bradlaugh* (3), where he says: "It might perhaps be also found, though it is not for "us on the present occasion to decide, that even of two judicial "acts done on the same day, the Court would inquire, if it "were necessary, which was done at the earlier time of the "day."

All the cases cited on behalf of the appellant are cases of competition between two judicial acts. This point has never come up before. There is no magic in the rule that all judicial acts are presumed in law to have taken place at the earliest period of the day on which they are done, and in this particular case the Court is at liberty to disregard that rule. The appellant is an innocent third party, and there is a debt due to him. Even where the judicial act is in competition with the act of a bona fide third party, the Court is not rigidly bound to prefer the judicial act.

The essence of the argument on the other point is that the appellant was a mere conduit pipe. He was, in fact, very much more than that. The arrangement between him and the bankrupt was his safeguard against a failure of the bankrupt, and amounted to an assignment by way of charge.

There was an agreement between the bankrupt and

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(1) See note (1) ante, p. 729.

(2) [1897] 1 Q. B. 122.

(3) 8 Q. B D. 63, 65, 66.

Wheeler, binding on the conscience of the bankrupt, to apply certain future funds in a certain way. Such an agreement, binding on the bankrupt's conscience, will be enforced in equity. Therefore, when those funds come into existence, they must be applied by the bankrupt in that certain way, and an injunction can be obtained to prevent his applying them in any other way: *Tailby* v. *Official Receiver.* (1) The only authority against this contention is *Palmer* v. *Carey* (2), and if that case is good law, this contention, of course, is bad.

Cur. adv. vult.

1938. April 4. LUXMOORE J. The judgment I am about to deliver is the judgment of the Court.

This is an appeal from an order of His Honour Judge Clements sitting in the Rochester County Court. The order was made on January 19 last, on a motion by the trustee of the estate of Frederick Baden Warren, a bankrupt. By his order the learned judge directed that the appellant, Alfred Morris Wheeler, who was the respondent to the motion, should pay to the trustee in bankruptcy the sum of 963*l.* 9*s.* 3*d.* The appellant appeals from the decision and says that no part of the sum in question is properly payable by him to the trustee in bankruptcy.

The appeal raises two points of law, either of which if answered in the appellant's favour is sufficient to entitle him to have the order of the learned county court judge discharged. [His Lordship read the statement of facts as set out above.]

The first point is: Was the money received by Hardman & Sons from the building society impressed with a trust under which they were bound to deal with it in the manner in which they did, or to put the question in a slightly different form, was there by reason of the arrangement between the bankrupt, the appellant and Hardman & Sons, an equitable assignment of the moneys received by Hardman & Sons from the building society for the purpose specified, or did the money remain the property of the bankrupt so that he could deal with it or direct Hardman & Sons to do so at his discretion? The second point is this: Assuming that the moneys in question remained the property of the bankrupt, was the payment of the 963*l.* 9*s.* 3*d.* in to the appellant's banking account protected under the provisions of s. 45 of the Bankruptcy Act, 1914? (1)

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(1) (1888) 13 App. Cas. 523.

(2) [1926] A. C. 703.

The learned county court judge decided both points in favour of the trustee in bankruptcy. He held that the arrangement between the parties did not constitute a contract between them but only amounted to a statement of the procedure to be followed with regard to any moneys received in respect of the Ramsden Road site and the buildings thereon, and that under it the bankrupt was under no obligation to pay the moneys in question to Hardman & Sons and that it gave no property in the money to the appellant.

It was argued that this was a finding of fact by the county court judge, and that consequently this part of the decision could not be questioned in this Court. We do not take that view. In our judgment the county court judge found that there was an arrangement between the parties to the effect already stated. His finding that this arrangement did not constitute a contract between the parties is in our judgment not a finding of fact but a conclusion of law resulting from the facts found in relation to the arrangement and is therefore open to review in this Court. We think the conclusion of the county court judge that the arrangement was not a contract is untenable. The parties agreed that the moneys derived from the site with the buildings on it should be dealt with in the manner specified as part of the arrangement under which the appellant agreed to guarantee, or to continue to guarantee, the bankrupt's overdraft at the bank, and by so doing enabled the finance necessary for exploitation of the site and buildings to be obtained by the bankrupt. It is true that the appellant was bound to apply any money received by him under the arrangement in reduction of the bankrupt's overdraft and to that extent for the bankrupt's benefit; but he had a vital interest in the particular application, for it was

(1) See note (1) ante, p. 729.

by this means that his liability to the bank was protected.

In our judgment as the result of the arrangement Hardman & Sons could not, without the joint consent of the appellant and the bankrupt, have dealt with the moneys otherwise than in accordance with the terms of the arrangement, and if the bankrupt had directed them to pay the moneys in question to himself or in any other manner than that authorized by the arrangement, Hardman & Sons would have been bound to refuse to do so. The case appears to us to fall within the decisions in *Holroyd* v. *Marshall* (1); *Tailby* v. *The Official Receiver* (2); *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (3); and *In re Lind.* (4)

Reliance was placed by Mr. Wiggins, on behalf of the trustee in bankruptcy, on the decision of the Privy Council in *Palmer* v. *Carey.* (5) At first sight the decision seems to lend support to the argument that the appellant obtained no interest in the money in question from the arrangement, but it appears to us that if this view of *Palmer* v. *Carey* (5) is correct it is in direct conflict with the decisions to which we have already referred. The decision was explained by Maugham J. in *In re Gillott's Settlement* (6), where he pointed out that the actual facts proved in the High Court of Australia (see sub nom. *Carey* v. *Palmer* (7)) show that no question of equitable assignment in fact arose, and that consequently the case throws no doubt on the correctness of the other decisions before mentioned.

For these reasons we are of opinion that the county court judge was in error in holding that the moneys in question were the moneys of the bankrupt with which he was free to deal as he desired. In our judgment the arrangement constituted a good equitable assignment of the moneys and consequently those moneys could not properly be dealt with otherwise than in accordance with the arrangement. It follows that the payment by Hardman & Sons of the moneys to the credit of the appellant's banking account in accordance

(1) 10 H. L. C. 191.
(2) 13 App. Cas. 523.
(3) [1905] A. C. 454.
(4) [1915] 2 Ch. 345.
(5) [1926] A. C. 703.
(6) [1934] Ch. 97.
(7) (1924) 34 C. L. R. 380.

with the arrangement cannot be impeached, because the moneys were not the moneys of the bankrupt to dispose of as he wished.

This is sufficient to dispose of the case, but as the second point was fully argued we think it right to deal with it. The appellant claims that the payment to his banking account (assuming the moneys so paid were, contrary to the opinion already expressed, the free moneys of the bankrupt) is protected by the provisions of s. 45 of the Bankruptcy Act, 1914. That section provides that : " Subject to the foregoing "provisions of this Act with respect to the effect of the bank-"ruptcy on an execution or attachment, and with respect to the " avoidance of certain settlements, assignments and preferences, " nothing in this Act shall invalidate, in the case of a " bankruptcy—(*a*) Any payment by the bankrupt to any of " his creditors." Then follow a number of other matters which are not material to be stated, and the section concludes with a proviso which, so far as material to the present case, is in these words : " Provided that both the following conditions "are complied with, namely—(i.) that the payment . . . . "takes place before the date of the receiving order ; and (ii.) "that the person (other than the debtor) to . . . . whom the "payment . . . . was made . . . . has not at the time of "the payment, ... notice of any available act of bankruptcy "committed by the bankrupt before that time." It is admitted that the second limb of the proviso was fulfilled in the present case, if the appellant was in fact otherwise within the section. The first point taken was that the section did not apply because the appellant was not a creditor. In view of the decision in *In re Paine* (1) we do not think this point is tenable.

The substantial question under the section therefore depends on what is the true meaning of the words " before the date "of the receiving order." It is admitted that the payment to the appellant's bank was made in point of time before the receiving order was pronounced. It was argued by Mr. Blagden on behalf of the appellant, both before the county

(1) [1897] 1 Q. B. 122.

court judge and in this Court, that the word " date " in the phrase " before the date of the receiving order " on the true construction of the section means the actual point of time when the order was pronounced and does not mean the date of the day on which the order was pronounced and which the order in fact bears. The learned county court judge held that the making of the receiving order was a judicial act and that in consequence it was unnecessary to consider at what point of time the actual pronouncement was made ; because it is a rule of law that a judicial act—and the making of a receiving order is admittedly such an act—is to be deemed to have been performed at the earliest moment of the day on which it is in fact performed. Mr. Blagden further argued that the rule is not of universal application, and called attention to a number of cases in which the Court ascertained the precise moment of the performance of a judicial act in order to ascertain the rights of persons claiming to have acquired such rights at an earlier time of the day on which the judicial act was performed. The rule is stated in *Edwards* v. *The Queen* (1) by Coleridge J. in these terms : " The doctrine that judicial acts are to be "taken always to date from the earliest minute of the day on "which they are done, stands upon ancient and clear authority." In that case an adjudication in bankruptcy and appointment of an official assignee had taken place on the same day as, but at an earlier period of it than, the issue of a writ of extent against the bankrupt for a Crown debt. Coleridge J. pointed out that : " Although the Court will inquire at what "time a party does an act, as filing a bill, or delivering his "declaration, and for that purpose will take notice of the usual "hours for sitting (see 2 Lev. 141, 176 ; Bull, N. P. 137), "it is otherwise with regard to a judicial proceeding. This "distinction is pointed out in *Lord Porchester's Case* (2) by "Lord Mansfield, and recognised by Buller J. in *Pugh* v. "*Robinson* (3) ; it is, indeed, also mentioned in the judgment "of *Swain* v. *Morland*. (4) The extent, according to this,

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(1) (1854) 9 Ex. 628, 631, 632.

(2) *Porchester* v. *Petrie* (1783) 3 Doug. 261.

(3) (1786) 1 T. R. 116.

(4) (1819) 1 Brod. & Bing. 370.

"operated from the first moment of the day, in the course "of which the assignment was executed, and therefore must "be taken to have preceded the assignment; if so, the "foundation of the defendant's case fails, for until the "execution of the assignment, the property as against the "Crown remained in the bankrupt. If, indeed, it should be "considered that the appointment of the assignees is itself "also a judicial act, and not, as the conveyance by the "Commissioners formerly was, merely ministerial, and that "it must therefore be taken, equally with the extent, to date "from the beginning of the day, then the two acts will be "concurrent; and it has never been disputed, nor was it "contended upon the argument, but that the Crown in such "case has priority over the subject. This point is too clear "to need any confirmation by authority."

In *Wright* v. *Mills* (1) Bramwell B. said with reference to *Edwards* v. *The Queen* (2), which was approved by the Court, that the decision was supported, "on the principle that "judicial acts shall have precedence of others. To give "priority to such acts you must suppose them to have been "before the others. It is not that you do not inquire into "fractions of a day, but that you give precedence to the "judicial proceeding." In *Clarke* v. *Bradlaugh* (3) Lord Coleridge said with reference to the rule that "it might "perhaps be also found, though it is not for us on the present "occasion to decide, that even of two judicial acts done on the "same day, the Court would inquire, if it were necessary, "which was done at the earlier time of the day." He refused to recognize the universality of the rule even as to judicial acts. Baggallay L.J. in the same case said (4): "Now the "authorities seem to establish that judicial acts are referred "to the first moment of the day, although I do not desire to "be considered as holding this to be an inflexible rule." While Lord Esher (then Brett L.J.) said (5): "*Edwards* v. *The* "*Queen* (2), in which the distinction is taken between the act

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(1) (1859) 4 H. & N. 488, 493.

(2) 9 Ex. 628.

(3) 8 Q. B. D. 63, 65, 66.

(4) 8 Q. B. D. 67.

(5) Ibid. 68.

"of the party and the act of the Court, is clearly binding upon "us." He also said: "As for the rule that judicial acts relate "back to the earliest moment of the day, I know of no "principle on which it can be founded. It is an artificial "rule, declared for a long number of years to be a part of "common law procedure, and therefore it is to be assumed "to be as old as the common law itself."

The result of these cases seems to us to be plain that when there is competition in point of time between a judicial act and the act of a person, that is, a non-judicial act, the application of the rule gives precedence to the judicial act. If however the competition is between two judicial acts, the actual time when each was done can be considered and priority given to the judicial act earlier in point of time unless there be some other ground for preferring the one act to the other, as in *Edwards* v. *The Queen*. (1) It is unnecessary to refer in detail to the cases cited by Mr. Blagden; it is sufficient to say that they are not in conflict with the view expressed and are reconcilable with the authorities to which we have referred on this basis—in all of them the competition was between two judicial acts, namely, the issue of a fieri facias and the doing of some other judicial act—and that in none of them was preference given to a non-judicial act at the expense of a judicial one by reason of the fact that the non-judicial act was performed at an earlier moment of the same day than the judicial act.

In our judgment the making of the receiving order in the present case was a judicial act and must in accordance with the rule be referred back to the earliest moment of March 15, 1937, while the payment into the bank was a non-judicial act, and, although in point of time it took place earlier than the receiving order, it cannot be treated as having been made before the receiving order.

We are therefore of opinion that the learned county court judge came to the right conclusion on this point. Having regard to the opinion already expressed on the first part, we hold that the judgment of the county court judge must be

(1) 9 Ex. 628.

reversed and the appeal allowed, with the result that the motion of the trustee in bankruptcy will be dismissed. The trustee in bankruptcy must pay the costs in this Court and in the court below. The appellant's deposit will be paid out to him.

Solicitors: *J. D. Langton & Passmore; Braby & Waller.*

A. R. LL.-T.

KNIGHTSBRIDGE ESTATES TRUST, LIMITED *v.* BYRNE AND OTHERS.

LUXMOORE J.

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Jan. 13, 14, 18; *Mar.* 1, 2, 3; *April* 13.

[1937. K. 171.]

Mortgage—Real estate—Demise for long term—Covenant for repayment by eighty half-yearly instalments—Claim of mortgagor to redeem on giving six months' notice—Rule against perpetuities—Clog on the equity of redemption—Whether mortgage a debenture—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 74, 380.

A company owning a considerable area of freehold land in the county of London mortgaged it by deed in 1931 to a friendly society to secure a loan of 310,000*l*. By the deed the company (the plaintiffs in the action) by clause 1 covenanted (inter alia) with the friendly society (the defendants) to repay to them the principal moneys so borrowed with interest by eighty half-yearly instalments of principal and interest combined on the two half-yearly days therein mentioned. There was the usual proviso in case of default. By clause 2 the plaintiffs demised the mortgaged land to the defendants for a long term of years with the usual proviso for cesser. There was a further covenant by the plaintiff company with the defendants that if the plaintiff company should (inter alia) pay the defendants the sum so borrowed with the appropriate interest by the instalments and on the half-yearly days mentioned in the deed, and should not have committed any breach of any covenant in the deed or any breach of any obligation, statutory or otherwise, binding on the plaintiffs, then the defendants would accept payment of the sum so lent on mortgage by the instalments and in the manner specified in the deed and would not require payment of such principal moneys otherwise than by such instalments.

The plaintiffs, being desirous of redeeming the property so mortgaged by the repayment of the principal moneys borrowed, notwithstanding the stipulation contained in the deed as to the repayment by eighty half-yearly instalments, sought by action a declaration that they were so entitled to redeem at any time on giving the usual notice.

Several questions arose for the decision of the Court—namely: (1.) whether, on the true construction of the deed, the plaintiffs were entitled to redeem the property mortgaged on giving the usual six months' notice; (2.) if the answer should be in the negative, whether the provision in the mortgage deed postponing the right of redemption for a period of forty years was void as infringing the rule against perpetuities; (3.) if the answer to this question should be in the negative, were the provisions of the mortgage deed so unreasonable as to constitute a clog on the equity of redemption, and (4.) whether the mortgage deed was

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KNIGHTSBRIDGE ESTATES TRUST, LD. *v.* BYRNE.

a debenture within the Companies Act, 1929, s. 380, and therefore whether s. 74 of that Act applied :—

Held, (1.) that on the true construction of the mortgage deed the plaintiff company was not entitled to pay off the mortgage money on giving the usual six months' notice.

(2.) That the condition in defeasance of the term of years created by the mortgage deed did not infringe the perpetuity rule, the rule against perpetuities not being applicable to mortgages.

(3.) That, having regard to the unusual provisions of the mortgage deed, they were, from the point of view of the mortgagor, onerous and unreasonable and constituted a clog on the equity. *Morgan* v. *Jeffreys* [1910] 1 Ch. 620 and *Davis* v. *Symons* [1934] Ch. 442 considered and followed.

(4.) That s. 74 of the Companies Act, 1929, does not apply to an ordinary mortgage, and the section therefore did not prevent the application of the equitable doctrine regarding unreasonable postponement of the period for redemption to the mortgage deed of 1931.

The plaintiff company was therefore entitled to the declaration sought.

ACTION.

In these proceedings the plaintiff company claimed (inter alia) a declaration that notwithstanding the provision in a certain mortgage deed entered into between them and the defendants for the repayment by the plaintiffs to the defendants of the principal moneys thereby secured together with the interest therein mentioned by eighty half-yearly instalments of principal and interest combined of 9308*l.* 14*s.* 3*d.* each, the plaintiffs were entitled, on giving the usual notice, to redeem the said mortgage upon payment of the principal moneys secured thereby with interest to the date of redemption and the proper costs of the mortgagees thereunder.

The deed in question was dated November 6, 1931, and was made between the plaintiff company (therein called " the borrower ") of the one part and the defendants, who were the trustees of the Royal Liver Friendly Society (therein called " the mortgagees ") of the other part. After reciting that the borrower was seised of the freehold properties mentioned in the schedule thereto in fee simple in possession and that the mortgagees had agreed to advance to the borrower the sum of 310,000*l.* out of the funds belonging to them as such trustees as aforesaid, it was witnessed by clause 1 that the borrower thereby covenanted with the mortgagees to pay to them the sum of 310,000*l.* together with interest at the rate of 5*l.* 5*s.* per annum, notwithstanding any judgment or order in which the covenant might become merged, by eighty half-yearly instalments of principal money and interest combined of 9308*l.* 14*s.* 3*d.* each (less income tax at the rate for the time being in force on such part thereof as should represent interest to the due date of payment of such instalment on the principal sum for the time being outstanding), such instalment to be paid on the dates and at the place therein more particularly mentioned. In the clause was contained a proviso that if default should be made by the borrower in payment of any one of the said half-yearly instalments of principal money and interest on the days thereinbefore appointed for payment of the same or within fourteen days afterwards, the whole of the principal money for the time being secured by the mortgage deed together with interest thereon to date at the rate of 5*l.* 5*s.* per annum should immediately become payable by the borrower and be recoverable forthwith by the mortgagees by all or any of the remedies conferred upon them by statute or otherwise. By clause 2 the borrower as beneficial owner demised unto the mortgagees all the freehold properties shortly described in the schedule thereto, to hold the same unto the mortgagees for a term of three thousand years from the date of the mortgage without impeachment of waste, subject to a covenant on the part of the borrower and certain stipulations contained in a conveyance and the benefit of an underlease and agreements for tenancy therein in the mortgage deed more particularly referred to, and subject also to the proviso for cesser therein mentioned—namely, that if the borrower should pay to the mortgagees the sum of 310,000*l.* together with interest thereon at the rate of 5*l.* 5*s.* per cent. per annum by the instalments at the respective times and in manner specified in the covenant by the borrower thereinbefore contained and if the borrower should also pay to the mortgagees all costs, charges, expenses and payments properly incurred or payable or allowable to the mortgagees in relation to or incidental to the security together with interest at the said rate according to the covenant by the borrower thereinbefore contained, the mortgagees would at the request and cost of the borrower surrender the properties thereby mortgaged unto the borrower or the persons deriving title under it, or as it, he or they might direct.

By clause 3 the mortgagees covenanted with the borrower that if the borrower should pay to the mortgagees the said sum of 310,000*l.* with interest thereon at the rate aforesaid by the instalments (of principal and interest combined) on the half-yearly dates and in the manner thereinbefore provided, or should pay the same within fourteen days next after the day so appointed for payment thereof, and if there should not have been any breach of any obligation, statutory or otherwise, binding on the borrower or any of the covenants, whether express or implied therein contained, and on its part to be observed and performed, then and in such case the mortgagees should accept payment of the said sum of 310,000*l.* and interest thereon by the instalments and in manner aforesaid, and would not require payment of such principal money otherwise than by such instalments.

It was further provided that the mortgagees should be at liberty to exercise all the powers conferred upon mortgagees by the Law of Property Act, 1925, if the plaintiff company should sell the equity of redemption of the mortgaged hereditaments or any part thereof without the written consent of the mortgagees, such consent not to be unreasonably withheld.

The plaintiff company being desirous of redeeming the mortgaged property, notwithstanding the provisions of the mortgage deed, commenced these proceedings, asking for the declaration above mentioned.

F. R. Evershed K.C. and *J. H. Stamp* for the plaintiffs. The borrower has a prima facie right to repay the loan on giving proper notice. Although there is a covenant to pay by instalments, there is no covenant by the borrower not to redeem in the meantime. Even if the Court comes to a different conclusion in regard to construction of the document, there is a clog on the equity of redemption which cannot be permitted.

The mortgage is not a "debenture" within the meaning of s. 380 of the Companies Act, 1929. The word "debentures" in s. 74 of that Act (1) is used in its familiar sense. Compare s. 79 of the Act. See also *De Beers Consolidated Mines, Ld.* v. *British South Africa Co.* (2), and compare *Viscountess Rhondda's Claim.* (3) The history of the legislation dealing with the subject supports that view. Sect. 14 of the Companies Act, 1907, regarding perpetual debentures, was not intended to refer to securities such as this, nor was the definition of "debenture" in s. 380 of the Companies Act, 1929. Debenture in this connection should be construed in its ordinary sense: *Topham* v. *Greenside Glazed Fire-Brick Co.* (4) See Palmer's Company Precedents, 14th ed. (1933), Part iii., Ch. i.

If it is held that the security is not a "debenture," then it is submitted that the provisions in the mortgage constitute a clog on the equity of redemption. The right to redeem is of the essence of a mortgage: *Noakes & Co., Ld.* v. *Rice.* (5) Any restrictions on redemption must be reasonable: *Talbot* v. *Braddill* (6); *Teevan* v. *Smith* (7), and *Biggs* v. *Hoddinott.* (8) Oppressive conditions will not be enforced: *Morgan* v. *Jeffreys* (9); *Fairclough* v. *Swan Brewery Co., Ld.* (10); *Davis* v. *Symons.* (11)

There are some especially onerous features in the present case, such as the length of the period, which is twice that in *Davis* v. *Symons* (1), the provisions restricting the sale of the equity of redemption, and the fact that the whole of the property may still be held as security when a sum of only about 10,000*l.* is owing.

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(1) Companies Act, 1929, s. 74: "A condition contained in any "debentures or in any deed for "securing any debentures, whether "issued or executed before or "after the commencement of this "Act, shall not be invalid by "reason only that the debentures "are thereby made irredeemable "or redeemable only on the "happening of a contingency, "however remote, or on the expiration of a period, however "long, any rule of equity to the "contrary notwithstanding."

(2) [1912] A. C. 52, 55, 71.

(3) [1922] 2 A. C. 339, 365.

(4) (1887) 37 Ch. D. 281.

(5) [1902] A. C. 24, 27, 30.

(6) (1683) 1 Vern. 183.

(7) (1882) 20 Ch. D. 724.

(8) [1898] 2 Ch. 307.

(9) [1910] 1 Ch. 620.

(10) [1912] A. C. 565.

(11) [1934] Ch. 442.

J. M. Gover K.C. and *Wilfrid M. Hunt* for the defendants. If A agrees with B in consideration of a loan of 1000*l.* from B to A that he, A, will repay the loan five years hence, then B cannot sue for the debt until the expiration of that period; and A cannot pay off the debt until then, if B does not choose to take it. The same principle would apply if the loan were made by instalments: see Fisher and Lightwood on Mortgages, 7th ed. (1931), p. 587 et seq.; *Brown* v. *Cole.* (2) These contentions are supported by the authorities in general: *Bovill* v. *Endle* (3); *Ex parte Wickens* (4); *Ex parte Ellis* (5); *West Derby Union* v. *Metropolitan Life Assurance Society* (6); *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ld.* (7) On the true construction of the document the borrower has no right to pay off the debt otherwise than on the contractual dates, and no right to call for reconveyance before the contractual time arrives. There is no equitable principle as to irredeemability or clogging or otherwise which in the circumstances of the present case would enable the borrower in derogation of his legal contractual obligation to pay off and redeem at an earlier time than he has agreed to do. Even if such equitable principle existed, it would be excluded by the Companies Act, 1929. The Legislature intended that such a security as this should come within the definition of "debenture" in that Act. The present case is covered by s. 74 of that Act (8), which says that a debenture of a company may be irredeemable, or redeemable on the expiration of a period, notwithstanding any rule of equity: see Buckley's Company Law, 11th ed. (1930), pp. 154, 155. No equitable principle in this case would allow the borrower to pay off at an earlier date than he has agreed to do. There is no real question of a clog on the equity of redemption: *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ld.* (1); *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ld.* (2); see also *Fairclough* v. *Swan Brewery Co., Ld.* (3); *Davis* v. *Symons.* (4) The question whether the right to redeem is clogged cannot arise at all until the right to redeem arises. The authorities it is admitted show that equity will not permit an unconscionable bargain to be carried out or enforce a provision which makes a mortgage practically irredeemable: compare such cases as *Talbot* v. *Braddill* (5); *Newcomb* v. *Bonham* (6); *In re Carshalton Park Estate, Ld.* (7); *Cowdry* v. *Day* (8); *Price* v. *Perrie* (9); see also *Floyer* v. *Lavington* (10); *Ramsbottom* v. *Wallis* (11); *Lawless* v. *Mansfield* (12); *In re Fortescue's Estate* (13), *Davis* v. *Symons.* (4)

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(1) [1934] Ch. 442.
(2) (1845) 14 Sim. 427.
(3) [1896] 1 Ch. 648, 651.
(4) [1898] 1 Q. B. 543, 547.
(5) [1898] 2 Q. B. 79.
(6) [1897] A. C. 647.
(7) [1914] A. C. 25, 47, 48.
(8) See note (1) ante, p. 745.

In re Hone's Estates (14) and *Teevan* v. *Smith* (15) are not authorities to the effect that any particular period of postponement is bad. The dictum of Jessel M.R. in *Teevan* v. *Smith* (15): " For although the law will not allow a mortgagor "to be precluded from redeeming altogether, yet he may be "precluded from redeeming for a fixed period, such as five "or seven years," should not be interpreted in that sense. The real question is whether the bargain was oppressive or unreasonable: compare *Biggs* v. *Hoddinott* (16); *Morgan* v. *Jeffreys* (17); *Fairclough* v. *Swan Brewery Co., Ld.* (3)

There was nothing in the negotiations leading up to the mortgage in the present case to suggest anything oppressive or unreasonable. The parties carried out the transaction at arm's length, and had competent advice throughout. There is mutuality in the material provisions, and there can be no question of a clog on the equity of redemption.

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(1) [1904] A. C. 323, 325, 327, 329.

(2) [1914] A. C. 25, 35, 46, 60.

(3) [1912] A. C. 565.

(4) [1934] Ch. 442.

(5) (1683) 1 Vern. 183, and (1686) at p. 393.

(6) (1681) 1 Vern. 7, and (1683) at p. 231.

(7) [1908] 2 Ch. 62.

(8) (1859) 1 Giff. 316.

(9) (1702) 2 Free. Ch. 257.

(10) (1714) 1 P. Wms. 268.

(11) (1835) 5 L. J. (N. S.) (Ch.) 92.

(12) (1841) 1 Dr. & W. 557.

(13) [1916] 1 I. R. 268, 279.

(14) (1873) Ir. R. 8 Eq. 65.

(15) (1882) 20 Ch. D. 724, 729.

(16) [1898] 2 Ch. 307, 309, 320, 322.

(17) [1910] 1 Ch. 620, 626.

J. H. Stamp in reply. An essential part of a mortgage is that there should be a right of redemption: *Noakes & Co., Ld.* v. *Rice.* (1) But it must be a reasonable right of redemption, having regard to the provisions of the document, and the circumstances of the case. Under the terms of the mortgage a large block of properties would be tied up so that it would be practically impossible to deal with them except on most onerous terms. Property worth some 400,000*l.* might remain tied up for a number of years, until at last a sum of only about 18,000*l.* or 9000*l.* is owing, and still the properties would remain tied up. It is recognized that borrowers and lenders are hardly ever on level terms. There is no complete mutuality in this case.

The dictum of Jessel M.R. in *Teevan* v. *Smith* (2) that a mortgagor may be precluded from redeeming for five or seven years indicates the kind of period that would be considered reasonable. An unreasonable period would not be permitted: *Biggs* v. *Hoddinott* (3); *Bradley* v. *Carritt.* (4) In *Morgan* v. *Jeffreys* (5) the period of postponement was only twenty-eight years, as compared with forty years in the present case. Postponement for forty years would, in the case of an ordinary borrower, exclude him substantially for life. The provisions in the present case are far more onerous to the borrower than those which were set aside in *Davis* v. *Symons.* (6)

Sect. 74 of the Companies Act, 1929 (7), does not apply to this mortgage. It is not a debenture. Such questions must be decided by reference to the context: *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (8) A debenture is commonly understood to be an instrument for the purpose of adding to the capital of a company. That

(1) [1902] A. C. 24, 30.
(2) 20 Ch. D. 724, 729.
(3) [1898] 2 Ch. 307, 311.
(4) [1903] A. C. 253, 259.
(5) [1910] 1 Ch. 620.
(6) [1934] Ch. 442.
(7) See note (1) ante, p. 745.
(8) (1881) 7 Q. B. D. 165.

was the reason for the exemption of debentures from the ordinary rules of equity as to redemption. An ordinary mortgage of freeholds with payment by instalments or otherwise has never intentionally been referred to as a debenture: *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (1); *Edmonds* v. *Blaina Furnaces Co.* (2); *Levy* v. *Abercorris Slate and Slab Co.* (3) Sect. 14 of the Companies Act, 1907, was intended to apply to debentures in the ordinary sense. The words "for removing doubts" in that section were meant to refer to the doubts about perpetual debentures and the validity of the conditions making them irredeemable. They could not have been intended to refer to an ordinary mortgage of freeholds. The interpretation of debenture in the Companies Act, 1908, only contains the words "'debenture' "includes debenture stock." There is nothing in that Act to extend the operation of s. 103, which says: "A condition "contained in any debentures or in any deed for securing "any debentures, whether issued or executed before or "after the passing of this Act, shall not be invalid by "reason only that thereby the debentures are made irre"deemable or redeemable only on the happening of a con"tingency, however remote, or on the expiration of a period, "however long, any rule of equity to the contrary notwith"standing." Sect. 380 of the Companies Act, 1929, says: "'debenture' includes debenture stock, bonds and any other "securities of a company whether constituting a charge on "the assets of the company or not." The Companies Act, 1929, is a consolidation Act. It is most unlikely that the law would be altered by general words in the definition clause of a consolidation Act.

In the course of the proceedings a question arose whether the provisions of the mortgage deed might not infringe the rule against perpetuities and the matter was ordered to stand for restoration to the list for further argument on this point.

The case was subsequently restored to the list, in order that this point might be argued, namely, whether the provisions of the mortgage constituted a breach of the rule against perpetuities.

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(1) (1881) 7 Q. B. D. 165.
(2) (1887) 36 Ch. D. 215, 218.
(3) (1887) 37 Ch. D. 260.

1938. March 1, 2, 3. *F. R. Evershed K.C.* and *J. H. Stamp* continuing for the plaintiffs. The material provisions of this mortgage constitute, it is submitted, a breach of the rule against perpetuities. Both from the aspect of the legal estate and the equitable interest the rule should be regarded as applying to this mortgage. The borrower's right to determine the term does not arise until forty years from the date of the mortgage. The lender's power of sale would not necessarily arise within the prescribed period. The general modern tendency has been to expand the rule against perpetuities, apart from definite exceptions, such as leases at a rent: see the Third Report of the Real Property Commissioners: *The Duke of Norfolk's Case.* (1) Mr. Gray was apparently of opinion that the rule applied to mortgages: Gray's Rule against Perpetuities, 3rd ed. (1915), ch. xvi., p. 460 et seq. A common law condition in defeasance of a fee simple which might take effect outside the limits is void as infringing the rule against perpetuities: *In re Hollis' Hospital (Trustees of) and Hague's Contract* (2); *In re Ashforth.* (3) The law in regard to a fee simple would apply equally to a term of years, so far as the application of the rule in the present case is concerned. If there is no right to redeem at law or in equity for forty years, the case must come within the rule. The authorities show that the rule against perpetuities is of general application, apart from the well recognized exceptions: *London & South Western Ry. Co.* v. *Gomm* (4); *In re Frost* (5); *In re Hollis' Hospital (Trustees of) and Hague's Contract* (2); *In re Ashforth* (3); *In re Tyrrell's Estate* (6); *In re Da Costa* (7); *Wood* v. *Drew* (8); *Morgan* v. *Davey.* (9) A mortgage is an incumbrance of property for the benefit of someone otherwise a stranger. In

(1) (1683) 3 Ch. Cas. 1.
(2) [1899] 2 Ch. 540.
(3) [1905] 1 Ch. 535.
(4) (1882) 20 Ch. D. 562, 580.
(5) (1889) 43 Ch. D. 246.
(6) [1907] 1 I. R. 194.
(7) [1912] 1 Ch. 337.
(8) (1864) 33 Beav. 610.
(9) (1883) 1 Cab. & El. 114.

regard however to such cases as covenants for the renewal of leases and the non-application of restrictive covenants, the rule really makes for better commercial use of the land. There is no valid reason for classing mortgages among the exceptions to the rule against perpetuities.

J. M. Gover K.C. and *W. M. Hunt* for the defendants. In the course of time a number of recognized exceptions have been made to the rule against perpetuities. One of these exceptions is of conditions in defeasance of a term of years, despite Buller J.'s remarks in *Roe* v. *Galliers.* (1) See Challis's Law of Real Property, 3rd ed. (1911), p. 186. These remarks of Buller J., if they have any bearing on the matter, are only dicta in any case; they are contrary to the submission put forward on the part of the defendants. Compare Marsden on the Rule against Perpetuities (1883), pp. 7 and 15. Halsbury's Laws of England, 2nd ed., vol. 25, p. 102, para. 189, and see note (*t*); p. 122, para. 219, and see *In re Tyrrell's Estate.* (2) But see now s. 4, sub-s. 3, of the Law of Property Act, 1925, in view of which the cases, it is submitted, are not very material.

The equitable estate in the term is in the mortgagor; the legal estate is vested in the mortgagee: compare Byrne J.'s remarks in *Wainwright* v. *Miller.* (3) The rule cannot apply to a mortgage; it is absolutely inconsistent with the history and principle of a mortgage: see Powell on Mortgages, 6th ed., 1826, p. 373A; on the question of a Welsh mortgage; *Howel* v. *Price.* (4) Compare also Gray on the Rule against Perpetuities, 3rd ed., p. 185, para. 214, and Lewis on Perpetuities, 1843 ed., p. 170. *Teulon* v. *Curtis.* (5) But in any event the rule does not apply to mortgages. Halsbury's Laws of England, 2nd ed., 1937, vol. 25, p. 160, note (*q*). The authorities cited on behalf of the plaintiffs are on a different footing from the case with which the Court is concerned.

Apart from Halsbury's Laws of England and Gray on Perpetuities no text-book of repute dealing with the relevant subjects appears to have dealt with the suggestion that mortgages might come within the policy of the rule. To apply the rule against perpetuities to mortgages would be inconsistent with the main principles that have been established. Such can be shown by reference to such securities as Welsh mortgages above referred to. Moreover there are other forms of security, of the same class as mortgages, to which it has never been suggested that the rule applies. In any event, it is possible to sever the void from the valid provisions: *Worthing Corporation* v. *Heather* (1); *South-Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (2) The suggestion that the rule against perpetuities can apply here is merely academic, and, in the absence of authorities, can not be maintained.

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(1) (1787) 2 T. R. 133, 140.

(2) [1907] 1 I. R. 194; on appeal 294, 298.

(3) [1897] 2 Ch. 255, 259.

(4) (1715) 1 P. Wms. 291.

(5) (1832) You. 610.

J. H. Stamp in reply. The reason for the absence of contentions in text-books (except Gray on the Rule against Perpetuities) in favour of the rule applying to mortgages is that so few mortgages would give rise to the contention. There are hardly any of the reported cases in which the period of time was sufficient for the question to arise. There is no real similarity between mortgages and the recognized exceptions to the rule. Thus, in the case of limitations to take effect after an estate tail, the estate tail can be brought to an end by disentailing. In the other classes of exception there is no definite loss of marketability, as there would be in the case of a mortgage such as this. It cannot be politic to sanction such types of mortgage. General principles should be maintained, and the rule against perpetuities applied.

Cur. adv. vult.

1938. April 13. LUXMOORE J. Knightsbridge Estates Trust Ld. was incorporated in the year 1926 with limited liability under the Companies Acts, 1908 to 1917. It has since its incorporation carried on and still carries on business in connection with the acquisition, ownership and management of real estate in London. In the year 1931 it borrowed from

(1) [1906] 2 Ch. 532.

(2) [1910] 1 Ch. 12.

the trustees of the Royal Liver Friendly Society the sum of 310,000*l.* upon terms set out in a mortgage deed dated November 6, 1931. It was a term of that deed that the 310,000*l.* should be repaid with interest at 5¼ per cent. per annum by eighty half-yearly instalments spread over a period of forty years.

On February 25, 1937, the plaintiff company instituted this action against the defendants, Alfred Byrne, Thomas Hamblett and Joe Gledhill as trustees of the Royal Liver Friendly Society claiming a declaration that notwithstanding the provision for repayment by instalments the plaintiff company is entitled after the expiration of six months' notice to redeem the mortgaged premises upon payment to the defendants of the principal money secured by the mortgage with interest down to the date of redemption and the proper mortgagees' costs.

The action came before me at the beginning of these sittings, and after hearing argument by counsel for the respective parties I reserved judgment. On looking into the matter I found in Gray's book on the Rule against Perpetuities, 3rd ed., at p. 460, certain statements which suggested that there was a serious question whether all or any of the provisions of the mortgage deed infringed that rule. I accordingly directed the case to be restored to the list for further argument. The further hearing took place at the beginning of last month and occupied more than two full days.

There is no dispute of fact, the questions which arise being purely questions of law.

The first question is whether on the true construction of the mortgage deed the plaintiff company is entitled to give to the defendants six calendar months' notice of its intention to pay off the principal moneys remaining on the security of the mortgage deed and to repay such moneys to the defendants with interest down to the actual date of payment ? If the answer to this question be in the affirmative, no other question arises. But, if the answer be in the negative, then the following questions arise : (*a*) is the provision in the mortgage deed postponing the right of redemption thereunder for a period of forty years void as infringing the rule against perpetuities; (*b*) if the answer to the last question is in the negative, are the provisions of the mortgage deed so unreasonable as to constitute a clog on the equity of redemption and thus entitle the plaintiff company to redeem the mortgaged premises notwithstanding the provisions of the mortgage deed; and (*c*) is the mortgage deed a debenture within the meaning of the provisions of s. 74 of the Companies Act, 1929, and, if it is, what is the effect of those provisions with regard to the preceding questions.

I propose to deal first with the question of construction. The mortgage deed of November 6, 1931, is expressed to be made between the plaintiff company of the one part and the defendants, who are described in the deed as the trustees of the Royal Liver Friendly Society, of the other part. It contains two recitals, the first being to the effect that the plaintiff company is seised of the freehold properties particularized in the schedule to the deed. These properties comprise seventy-five houses, eight shops and a block of flats in the City of Westminster, in the County of London, situate respectively in Chesham Place, Chesham Mews, Lowndes Street, Motcomb Street, West Halkin Street, William Street and William Mews. The second recital is to the effect that the defendants had agreed to advance to the plaintiff company the sum of 310,000*l.* upon having repayment of that sum with interest thereon secured as provided by the mortgage deed. By the first clause of the testatum the plaintiff company, in consideration of the payment to it by the defendants of the sum of 310,000*l.*, covenant with the defendants to pay to them the sum of 310,000*l.* with interest at the rate of 5¼*l.* per cent. per annum by eighty half-yearly instalments of principal and interest combined of 9308*l.* 14*s.* 3*d.* each less income tax at the rate for the time being in force on such part thereof as represents interest to the due date of payment of such instalment on the principal sum for the time being outstanding under the mortgage deed. The instalments are payable on May 6 and November 6 in each year, the first instalment being payable under the deed on

May 6, 1932, and the last on November 6, 1971. The deed contains a proviso that if default shall be made by the plaintiff company in payment of any one of the half-yearly instalments of principal and interest on the appointed day or within fourteen days afterwards the whole of the principal for the time being secured by the deed with interest thereon to date at the rate of 5¼*l.* per cent. per annum should become immediately payable by the plaintiff company and be recoverable forthwith by the defendants by all or any of the remedies conferred on them by statute or otherwise. By clause 2 of the testatum the plaintiff company demised to the defendants the properties already mentioned for the term of 3000 years from November 6, 1931, without impeachment of waste, subject to the proviso that if the plaintiff company should pay to the defendants the sum of 310,000*l.*, together with interest thereon at the rate mentioned, by the instalments at the respective times and in manner specified in the covenant by the plaintiff company contained in the first clause, and should also pay the proper costs, charges and expenses of the defendants as mortgagees, together with interest thereon at the same rate, the defendants would at the request of the plaintiff company surrender the said properties to the plaintiff company or to the persons deriving title under it or as it or they might direct.

For the purpose of answering the first question it is unnecessary to refer to any of the other provisions of the mortgage deed except those to be found in clause 3. This clause contains a covenant by the defendants that if the plaintiff company should pay to the defendants the sum of 310,000*l.*, with interest thereon at the appropriate rate, by the instalments of principal and interest combined on the half-yearly dates and in the manner thereby provided, or should pay the same within fourteen days next after the day appointed for payment, and if there should not have been any breach of any obligation, statutory or otherwise, binding on the plaintiff company or of any of the covenants, express or implied, in the mortgage, and on its part to be observed and performed, then the defendants should accept payment of the said sum of 310,000*l.* and interest by the instalments and in the manner aforesaid and would not require payment of such principal money otherwise than by such instalments.

Mr. Evershed argued on behalf of the plaintiff company that on the true construction of the mortgage deed the plaintiff company was entitled to repay to the defendants the principal money secured at any time. He based his argument mainly on the absence of any covenant by the plaintiff company that it would not repay the loan except by the instalments specified, although there was a covenant by the defendants that if the plaintiff company complied with the provisions of the mortgage deed they would not require payment otherwise than by the agreed instalments. In considering this question it must be remembered that the answer depends on the interpretation of the language of the deed and that no equitable doctrine relating to mortgages can enter into the consideration of that interpretation. It is I think settled law that if A agrees with B in consideration of a loan from B to A to repay that loan with interest on a fixed future date, B cannot sue A for repayment of the loan before the arrival of that date, nor can A compel B to accept repayment of it before that date has arrived. It can make no difference to the legal effect of such a covenant if the deed containing it also contains a charge to secure its fulfilment. In Fisher and Lightwood on Mortgages, 7th ed. (1931), p. 587, it is stated that " a mortgage is usually "made redeemable at the expiration of six months from its "date, and where a time is fixed for redemption it does not "become redeemable until that time has arrived ; the mort-"gagee may take objection to an action to redeem at an "earlier day, even although the mortgagor tenders interest "during the whole intervening period." I was referred to a number of authorities in support of these statements, and those authorities appear to me to afford complete support for them. In *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co., Ld.* (1) Lord Parker said: " Taking the

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(1) [1914] A. C. 25, 47, 48.

"simple case of a mortgage by way of conveyance with a "proviso for reconveyance on payment of a sum of money "upon a specified date, two events might happen. The "mortgagor might pay the money on the specified date, "in which case equity would specifically perform the contract "for reconveyance. On the other hand, the mortgagor might "fail to pay the money on the date specified for that purpose. "In this case the property conveyed became at law an absolute "interest in the mortgagee. Equity, however, did not treat "time as of the essence of the transaction, and hence on "failure to exercise what may be called the contractual "right to redeem there arose an equity to redeem, notwith- "standing the specified date had passed. Till this date had "passed there was no equity to redeem, and a bill either to "redeem or foreclose would have been demurrable."

In the present case the bargain between the parties as disclosed by the mortgage deed is to repay the principal sum and interest by instalments spread over forty years. To compel the defendants to receive in one sum the principal secured at any time the plaintiff company might desire to repay it would be to deprive the defendants of the benefit of the agreement made by them with the plaintiff company and would be contrary to the tenor of the deed. I can see no ground for holding that on the true construction of the mortgage deed the plaintiff company is entitled to pay off the mortgage money on giving six months' notice, and I therefore hold that the first question must be answered in the negative.

It is therefore necessary to consider the other questions formulated at the beginning of this judgment. The first of these is whether the postponement of the right of redemption under the mortgage deed offends against the rule against perpetuities. It is certainly more difficult to answer than the question of construction. So far as I have been able to discover, the question has not been the subject of any reported decision; nor have I been able to find any express reference to it in any of the numerous text books devoted to mortgages and to the rule against perpetuities other than Mr. Gray's well known treatise and in the articles on perpetuities and mortgages respectively in Halsbury's Laws of England. Mr. Gray, in the third edition of his book on the Rule against Perpetuities, devotes a chapter to mortgages (see pp. 460 to 463). In it he states that when the condition of a mortgage must be fulfilled if at all within twenty-one years after lives in being, no question of remoteness can arise as to the legal rights of the parties. The mortgagee has the fee simple subject to a condition, any rights under which must begin within the limits required by the rule against perpetuities. If the condition is such that the mortgagor's right of re-entry may not arise until a period beyond the limits of the rule, then such right would seem to be too remote. The foregoing statements are confined to the rights at law of the mortgagor and mortgagee. With regard to their rights in equity the learned author points out that when the condition of a mortgage must be fulfilled if at all within twenty-one years after lives in being no question of remoteness can arise as to the equitable rights of the parties. He then deals with the mortgagee's power of sale as conferred by the mortgage and points out that although it can be exercised at any time more than twenty-one years after lives in being, it is merely a remedy given to enforce a right which the law would otherwise enforce for him and the power is therefore not invalid. He expresses the opinion that, if the condition of the mortgage is such that failure to fulfil it by the mortgagor may occur more than twenty-one years after lives in being, and if no lives are mentioned more than twenty-one years after the date of the mortgage, the mortgagee's rights on default by the mortgagor to have the land comprised in the mortgage applied in discharge of the debt are invalid ; and he instances a hypothetical case where the condition of the mortgage is to pay the mortgage debt in thirty years, and states that in such a case the condition would be too remote and the mortgagee's right would be invalid.

These statements are made with regard to a mortgage of freehold property in fee simple, and do not purport to deal with the case where the mortgage security is a term of years ; but Mr. Evershed in his argument claimed that there is no difference in principle between the two cases so far as concerns the mischief against which the rule against perpetuities is directed. It must, however, be borne in mind that in the courts of first instance at any rate it has been decided that a common law condition in defeasance of an estate in fee simple capable of taking effect outside the perpetuity limits is void: see *In re Hollis' Hospital* (*Trustees of*) *and Hague's Contract* (1); *In re Ashforth* (2); and that there has not only been no decision that a condition in defeasance of a term of years is within the rule, but the Real Property Commissioners in their third report (1832) stated with regard to these matters (see p. 43) that "the rule of law against "perpetuities applied in its origin to estates created by way "of use, or by devise," and that they had "treated it" —namely, the rule—" (as in truth it is) as principally "applicable to future contingent estates and interests; "but a perpetuity may be effected without the existence "of any contingent estate, by the creation of a long "term of years, with a proviso for determining it on the "happening of an event not within the limits of the rule; "for in such a case, although the reversion expectant on "the term is vested, and may remain vested, yet the acceleration of its taking effect in possession may produce the same "effect as the limitation of a future contingent estate, and it "is obvious, that by means of successive terms and successive "provisoes of this kind, a settlement might be made under "which land would continue inalienable for a much longer "period than the rule in question would permit. We are "not aware" (I quote the precise language of the report) "of any case where interests of this kind, created by a common "law assurance, have been held invalid under the rule now "under consideration; but as the mischief in such a case "must be the same as in the more ordinary cases of attempts "to create perpetuities, we do not hesitate in recommending "that such cases shall be brought within the operation of "the rule, taking care to except the case of landlord and "tenant, as already pointed out with reference to conditions

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(1) [1899] 2 Ch. 540.

(2) [1905] 1 Ch. 535.

"and covenants. The difference between these and future "limitations is, that here it must be declared, not that the "future interest to arise on a remote event shall be void, but "that the term made determinable on a remote event shall "become absolute. It will, of course, be necessary to except "estates tail." This is a clear statement that at the date of the report a condition in defeasance of a term of years was regarded as valid. There are no subsequent decisions in disagreement with this view. In Mr. Challis's book on Real Property, 3rd ed. (1911), p. 186, it is stated (and the passage is by Mr. Challis himself): "The main exceptions out of the "operation of the rule seem to be as follows: (1.) Conditions "in defeasance of a term of years. It has never been "suggested that such conditions are within the scope of the "rule, unless (which hardly seems to be the case) a loose remark "thrown out *obiter* by Mr. Justice Buller in *Roe* v. *Galliers* (1), "at page 140, amounts to such a suggestion. Since such "conditions have come almost daily before the courts during "some centuries, there could hardly be a stronger proof that "their validity is not open to question."

In face of the statement of the Real Property Commissioners and the passage from Mr. Challis's book to which I have referred, and in the absence of any subsequent decision to the contrary, I hold that the condition in defeasance of the term of years created by the mortgage deed does not infringe the perpetuity rule and is valid. I have dealt with this question because it was argued fully before me, but I doubt whether it was necessary to answer it, because I have come to the conclusion that mortgages are exempt from the perpetuity rule.

In the article on Perpetuities in Halsbury's Laws of England, 2nd ed., vol. XXV., at p. 160, *n*, (*q*), the opinions expressed by Mr. Gray and already quoted by me are discussed, and it is stated that "whatever be the true foundation of their "exemption, mortgages are undoubtedly exempt from the "rule." As I have already pointed out, apart from the two articles in Halsbury's Laws of England and Mr. Gray's book, there is no recognized text book on mortgages or on the rule against perpetuities which deals with the question or suggests that the condition of a mortgage falls within the mischief of the rule. Mr. Gover, on behalf of the defendants, relies on this as affording strong support for the view that mortgages fall within the numerous exceptions to the rule, of which perhaps the principal are limitations in remainder after an estate tail, covenants for renewal in leases however long, rights of re-entry and other conditions of defeasance of a term of years granted by a landlord to a tenant. Mr. Gover pointed out, and I agree with his argument, that to apply the rule to mortgages would be inconsistent with the history and principles of redemption of a mortgage. At the date of the third Report of the Real Property Commissioners a species of contract was in force which was commonly known as a Welsh mortgage. The ingredients of such a contract were a debt due and an estate as a security for repayment, but it differed from an ordinary mortgage contract in that the mortgagee received the rents and profits without any liability to account until the principal money was paid off, but there was no remedy to enforce payment of the debt. In such a case the right to redeem subsisted in perpetuity and the mortgagee could neither compel redemption nor obtain foreclosure. Many cases in relation to such a contract are to be found in the books (examples of which were cited during the argument), but in none of them was it ever suggested that the rule against perpetuities applied. This type of contract ceased to be effected, not because of any question as to its validity from the point of view of the rule against perpetuities, but because of the usury laws: see Powell on Mortgages, 6th ed. (1826), vol. i., p. 374, *n*, 374A.

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(1) 2 T. R. 133, 140.

An ordinary mortgage is, as already stated, redeemable at and not before the contractual date. When that date is past, equity allows redemption at any time thereafter. There is no time limit. This would appear on the face of it to be contrary to the rule against perpetuities, for possibilities, not probabilities, have to be considered in the application of the rule. Again in the case of a mortgage to secure a principal sum, without any date of payment being specified, the same position arises. In the case of a transaction not in form a mortgage but which is recognized in equity as such, the right of redemption is unlimited in point of time. Moreover the powers usually given to a mortgagee are not confined within the perpetuity limits, yet it cannot be contended that such powers are void unless they are so confined. In Lewis on the Law of Perpetuity (1843), at pp. 560 and 561, it is stated that notice must be taken of a class of unlimited powers "which, "on account of their being always subject to be defeated by the "beneficial owner, (although, not in consequence of any express "reservation of consent), or, rather, on account of the "nature of the object of the power presenting a guarantee "against undue remoteness in its execution, are, clearly, "unaffected by any objection on that head. The Powers in "question are the common Powers of sale, reserved to mort-"gagees, and their heirs, or executors and administrators, as "additional security for the repayment of the principal-money "and interest. These Powers, unquestionably, do not operate "as a clog upon the alienation of the property. . . . ." It is to be observed that Mr. Gray, in his book, at p. 462, himself says that if the question of the validity of a mortgage conditioned to be redeemed at a date too remote to fall within the rule against perpetuities should come before the courts, "it is to be hoped, should this be the case, that they will "frankly declare them an exception to the Rule against "Perpetuities, and not, by attempting to reconcile them "with the Rule, bring confusion into the Rule itself."

In this connection it is not immaterial to consider what the consequences would be if a mortgage in fee simple subject to a proviso for reconveyance at the date fixed for repayment of the principal, which is outside the perpetuity period, should be held to be void. As I have already stated, the covenant to repay the mortgage debt at the date fixed is valid. The covenant to reconvey at the fixed date is valid as a covenant although that date is outside the perpetuity limit. If the provision for reconveyance binding the land in the hands of the mortgagee is void and the corresponding provision entitling the mortgagor to require a reconveyance on that date is also void, the mortgagee is left with the fee simple without any liability in law to reconvey or any right of redemption at all. There can be no doubt but that in such a case equity would enforce the mortgagor's right to redeem when the debt was repaid although the repayment was made at the date fixed. To allow the mortgagor to repay the principal secured by the mortgage before the date fixed by the covenant for repayment would be to disregard the bargain between the parties and to make an entirely new bargain, although the original covenant is still binding on the mortgagor. If this reasoning is applied to the present case (and since the passing of the Law of Property Act, 1925, every mortgage which is in form effected by a conveyance of the fee simple is to be deemed to be a mortgage by demise for a term of three thousand years), and the proviso for the cesser of the term is considered to be void, the original term remains, and there is a statutory proviso for its cesser under the provisions of s. 115 of the 1925 Act which then comes into operation. It is difficult to see what there is in such a case to deprive a mortgagee of the term of years except in accordance with the original bargain. These considerations lead me to the conclusion that the rule against perpetuities is inapplicable to mortgages.

In dealing with the last question I have purposely refrained from any reference to the question whether the period of forty years fixed for repayment of the principal sum secured is a clog on the equity of redemption or not because this question is one which requires to be dealt with separately. It is stated in Coote on Mortgages, 9th ed. (1927), vol. 1, p. 15, that " under the old law no condition could be valid which "purported to restrict the right of redemption within a "limited period, such as the life of the mortgagor. He may, "however, stipulate that he will not pay off his debt and "so redeem his mortgage for a fixed period. But it must "be a *reasonable* period, as, for instance, for five or seven "years; ' it is an old and well-established practice, and a "' reasonable practice too,' But it is otherwise where the "period is unreasonable. Therefore a proviso restraining "redemption for so long a period as twenty-eight years is "always unreasonable and void, at least where there is no "corresponding restriction preventing the mortgagee from "calling in his money." If this is a correct statement of the law, it appears to me to afford strong support to the view already expressed by me that the rule against perpetuities has no application to mortgages. A number of cases are cited in support of the statement to which I have referred. My attention was called to the majority of them. In *Teevan* v. *Smith* (1) there is a dictum of Sir George Jessel M.R.: "Although the law will not allow a mortgagor to be precluded "from redeeming altogether, yet he may be precluded from "redeeming for a fixed period, such as five or seven "years." Sir Robert Romer, when a judge of first instance, approved of this dictum in *Biggs* v. *Hoddinott* (2) in these terms: "I take it that what was said by Sir George Jessel "in *Teevan* v. *Smith* (1) is good law, at any rate, so far as I "am concerned, and, indeed, I trust good law in whatever "court the question may ultimately be raised, namely, that "'Although the law will not allow a mortgagor to be pre"'cluded from redeeming altogether, yet he may be precluded "'from redeeming for a fixed period, such as five or seven "'years.'" In the case before Sir Robert Romer the period during which redemption was precluded was five years. With regard to it he said: "Now, I am of opinion that it is "obviously to the advantage of both the mortgagor and mort"gagee that such a provision should be enforced. Of course, "that does not prevent the Court in a proper case from "preventing the application of the clause if it is too large, "of there are circumstances connected with the proviso which "renders it, in the opinion of the Court, unreasonable or "oppressive."

In *Morgan* v. *Jeffreys* (3) the period during which redemption of the mortgage was precluded without the consent of the mortgagee was twenty-eight years. The mortgage was in a peculiar form and contained a number of provisions which

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(1) 20 Ch. D. 724, 729.

(2) [1898] 2 Ch. 307, 311.

(3) [1910] 1 Ch. 620, 629.

Joyce J. criticized adversely, although the mortgage was prepared by the mortgagor's solicitor. He referred to the dictum in *Teevan* v. *Smith* (1) to which I have already referred and to the judgment of Sir Robert Romer in *Biggs* v. *Hoddinott* (2), and pointed out that in the case before him the provisions for the continuance of the loan for the period of twenty-eight years were not mutual, the mortgagee being entitled to call in the mortgage debt at any time although the mortgagor was precluded from redeeming for the fixed period of twenty-eight years; and that other stipulations for the benefit of the mortgagee contained in the mortgage deed were of a severe character from the mortgagor's point of view. He accordingly held that the period of twenty-eight years "exceeded all reasonable limit" and he added that he could "not understand how the mortgagor could have been "allowed by his solicitor so to fetter himself." The learned judge made an order in favour of the mortgagor for redemption of the mortgage notwithstanding the proviso. In *Fairclough* v. *Swan Brewery Co., Ld.* (3) the Board of the Privy Council held that a mortgagor was entitled to redeem a mortgage of leasehold property which had twenty years to run where the mortgage contained a proviso that the mortgage debt should not be wholly paid off until a date within six weeks of the expiration of the lease. The ground of the decision was that the mortgage was, from the practical point of view, irredeemable.

In *Davis* v. *Symons* (4) Eve J. held that the mortgagor was entitled to redeem a mortgage although it contained mutual covenants between mortgagor and mortgagee that the principal sum should be allowed to remain on the security of the mortgage for a period of twenty years. The mortgage contained a provision that the mortgagor would not sell the equity of redemption except to a responsible person. The learned judge said: "The authorities . . . . establish "undoubtedly that the mere postponement of the date for "redemption for a moderate and reasonable period does not, "in the absence of other circumstances, avoid the contract."

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(1) 20 Ch. D. 724, 729.
(2) [1898] 2 Ch. 307, 311.
(3) [1912] A. C. 565.
(4) [1934] Ch. 442, 447, 448, 449.

After calling attention to a number of cases including *Teevan* v. *Smith* (1), he pointed out that in *Morgan* v. *Jeffreys* (2) the absence of a reciprocal covenant on the part of the mortgagee not to call in his money for a like period as was binding on the mortgagor had been regarded as an important consideration in estimating the reasonableness of the fetter imposed on the right to redeem. He said also: "I do not "think any of the cases where there is an absence of mutuality "assist very much in determining what is reasonable in cases "where both parties are bound to a fixed term. In determining the simple question whether any particular postponement is extravagant and oppressive the absence of a "corresponding restraint on the mortgagee must be regarded "as an important factor, but in cases where it is not suggested "that there has been any over-reaching, where there are "mutual covenants binding on mortgagor and mortgagee, "and where each party may be regarded as of an age and "competency to decide what was most beneficial to himself, "I do not see why one of them should be allowed to escape "from his contract merely because the postponement is a "long one and, as events have turned out, he would have "been better off had he adopted a different attitude at the "date of the mortgage. I am not prepared to say that in "the absence of other relevant factors the Court would, in "circumstances such as I have just referred to, regard a "period of twenty years as unreasonable; no doubt the "longer the suspensory period the more incumbent it is to "consider whether there are any provisions in the contract "calculated to make the ostensible mutuality more apparent "than real. In other words the question whether the contract "is reasonable or not cannot be decided without a full "examination of the whole deed." Later in his judgment he calls attention to the provision with regard to sale of the equity of redemption: the passage to which I desire to refer is on p. 449: "There is another provision which is certainly "not usual in mortgages—I do not know that I ever saw it "myself, but it may be that others with larger experience

(1) 20 Ch. D. 724.

(2) [1910] 1 Ch. 620.

"have seen it. It is no doubt a useful one from the "mortgagee's point of view, but must I think hamper the "mortgagor to an unreasonable extent. It is a special "covenant on the part of the mortgagor whereby he covenanted not to sell the equity of redemption except to a "responsible person."

Having regard to these decisions it is necessary to consider with some particularity the provisions of the mortgage deed of November 6, 1931. In the first place the covenant restricting the mortgagor's right of redemption for a period of forty years is a more severe restriction than is to be found in any of the reported cases, but in addition to this the mortgage deed contains a number of unusual provisions. In particular there is a provision that the mortgagees are to be entitled to exercise all the powers and remedies conferred upon mortgagees by the Law of Property Act, 1925, among other things if the plaintiff company should sell the equity in the mortgaged hereditaments or any part thereof without the written consent of the mortgagees, which consent should not be unreasonably withheld in the case of a respectable and responsible person. This provision is similar to the provision against the sale of the equity of redemption which was present in the mortgage in *Davis* v. *Symons* (1) and was held by Eve J. to be unreasonable. Further in the present case the mortgage is so framed that—although the security comprises a large number of separate houses and shops in the City of Westminster and although the mortgage deed provides for the reduction of the mortgage debt by half-yearly instalments—there is no power in the mortgagor to sell even one of the houses or shops freed from the mortgage, with the result that the mortgagor is prevented from dealing with any part of the mortgaged property otherwise than by a sale of the equity of redemption in the whole or any part of the mortgaged property, although the value of the whole of that property (which at the date of the mortgage was sufficient security for the debt of 310,000*l.*) may, at the date when a sale is desired, be many times in excess of the amount then secured, having regard to the number of instalments already paid to the mortgagees in respect of the debt. Further the plaintiff company is precluded from leasing any part of the property comprised in the security for any term in excess of three years without the consent of the mortgagees, while in the event of the plaintiff company making default in the covenants to repair or insure any part of the property at any time during the forty years, the mortgagee is entitled to exercise the statutory powers conferred by the Law of Property Act, 1925, although the value of the rest of the property comprised in the security is far in excess of the money remaining due under it at the date of the default.

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(1) [1934] Ch. 442.

In my judgment the provisions of the mortgage deed in the present case are far more onerous and unreasonable from the point of view of the mortgagor than those to be found in the mortgages considered by Joyce J. and Eve J. respectively in the cases to which I have referred.

If the mortgage deed of November 6, 1931, had been entered into between individuals, I should have no hesitation in holding that the period during which the mortgagor is precluded from redeeming is, having regard to all the provisions of the deed, unreasonable and that the mortgagor is entitled to redeem. It is said however that because the mortgagor is a company with limited liability it is precluded from relying on this ground of objection and from obtaining any relief in respect of the unreasonableness of the mortgage deed. Reliance is placed on the provisions of s. 74 of the Companies Act, 1929. Sect. 74 provides that: "A condition "contained in any debentures or in any deed for securing any "debentures, whether ' issued or executed before or after the "' commencement of this Act, shall not be invalid by reason "' only that the debentures are thereby made irredeemable or "' redeemable only on the happening of a contingency, however "' remote, or on the expiration of a period, however long, "' any rule of equity to the contrary notwithstanding.' " Sect. 380 of the same Act contains a definition of debenture in these terms: "' Debenture' includes debenture stock, bonds "and any other securities of a company whether constituting

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"a charge on the assets of a company or not." The question is whether the mortgage deed of November 6, 1931, is, on the true construction of the Act of 1929, a debenture falling within the section under consideration. If it is, then the rule that the period of redemption must not be postponed so as to be unreasonable has no application.

The definition in the Act does not appear to be intended to be exhaustive. Apart from it, no precise definition of the word " debenture " is to be found in the books : see *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (1) The term has been applied to documents of varying form. It is practically, although not exclusively, confined to documents issued by companies. A debenture either creates or acknowledges a debt : see *Edmonds* v. *Blaina Furnaces Co.* (2) ; *Levy* v. *Abercorris Slate and Slab Co.* (3) It is usually described in the document itself as such, but there is no necessity for this : see *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (4) If the document is described on its face as a debenture even if it provides no security beyond the acknowledgment of the debt and the promise to pay it, the document is for the purposes of stamp duty a debenture and must be stamped accordingly : see *Speyer Brothers* v. *Inland Revenue Commissioners.* (5) A debenture may or may not contain a charge or security and the charge or security may be fixed or floating. In either of which cases the debenture is frequently termed a mortgage debenture. It may consist of one document alone, or as is generally the case may constitute one of a series of documents ranking pari passu in point of priority. Frequently the payment of the money owing on debentures is secured by a trust deed containing a specific charge on property belonging to the company which created the debentures. Speaking generally the term " debenture " in the commercial world is used to describe a document securing or acknowledging the payment of money issued by a company, but it would in my opinion certainly be unusual for an ordinary mortgage of freehold property to be so described, although, if such a mortgage is executed by a company, it can properly be described as a security of the company.

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(1) (1881) 7 Q. B. D. 165, 168, 169, 172.

(2) (1887) 36 Ch. D. 215.

(3) 37 Ch. D. 260.

(4) 7 Q. B. D. 165.

(5) [1908] A. C. 92, 95.

It is necessary to consider whether the words " and any "other securities of a company " in the definition section include as a matter of construction such a mortgage as that under consideration. To arrive at a conclusion on the point it is necessary to consider the Act itself and the history and the circumstances under which s. 74 and the definition came into being. The subject-matter of s. 74 was first introduced into the legislative enactments relating to companies by s. 14 of the Companies Act, 1907, which was passed for the purpose of removing any doubt as to the validity of debentures issued on the terms that the principal moneys covered thereby were either not repayable or were only repayable in certain specified or contingent events, such as for example the winding-up of the company: see *In re Cuban Land Co. and Development Co.* (1911), *Ld.* (1) The section is in these words: " For removing "doubts it is hereby declared that a condition contained in "any debentures or in any deed for securing debentures, "whether issued or executed before or after the passing of "this Act, shall not be invalid by reason only that thereby the "debentures are made irredeemable, or redeemable only on "the happening of a contingency, however remote, or on the "expiration of a period, however long, any rule of equity to "the contrary notwithstanding." It is to be found in a fasciculus of sections numbered 10 to 18 inclusive under the title " Mortgages and Charges." Sect. 10 provides for the registration of mortgages and charges and in that section references are to be found to mortgages, charges and debentures. These sections contain provisions with regard to the registration of holders of debentures and the re-issue of redeemed debentures. Sect. 14 is expressed to be for the purpose of removing doubts and is of course retrospective. There was no doubt at the date when the 1907 Act was passed that an ordinary mortgage of freehold property was within the mischief of the rule of equity with regard to the postponement of the period of redemption for an unreasonable time, yet the section makes no mention of mortgages or charges but is confined in terms to debentures.

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(1) [1921] 2 Ch. 147, 151.

It is I think impossible to hold that the words " mortgages," " charges " and " debentures " are used in the 1907 Act as interchangeable terms. Indeed the opening words of s. 10 of the 1907 Act show clearly that the words are not intended to be used as being synonymous. The words to which I refer are " Every mortgage or charge created by a company after "the commencement of this Act and being either—(*a*) a "mortgage or charge for the purpose of securing any issue of "debentures. . . . ." Further s. 15 provides for the re-issue of debentures. It would be impossible to apply the provisions of this section to an ordinary mortgage of freehold property. If a first mortgage is paid off, the " payment off " enures for the benefit of the second mortgagee, if there is one ; and it would be impossible to re-issue the first mortgage—indeed the word " re-issue " is meaningless in the case of a mortgage which has been paid off. In the Companies Act, 1908, which is a consolidating Act, the provisions of s. 14 of the 1907 Act are to be found in s. 103. The words " for the purpose "of removing doubts " are omitted. Sect. 103 is one of a number of sections which appear under the general heading " Debentures and Floating Charges," while the provisions with regard to registration of mortgages and charges appear in a number of sections beginning with s. 93 under the general heading " Information as to Mortgages, Charges, etc." The 1908 Act contains in s. 285 a definition of " debenture " in these terms : " ' debenture ' includes debenture stock." The words " mortgages," " charges," " debentures " are all used in the Act ; but there is nothing further in the 1908 Act to suggest that these terms were used in that Act as being convertible terms. The Companies Act, 1929, was like the 1908 Act, also a consolidating Act ; s. 103 of the 1908 Act reappears as s. 74 in the 1929 Act. This is the section under consideration. In the 1929 Act it appears with a number of other sections beginning with s. 73 under the general heading

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"Special Provisions as to Debentures." In none of these sections does the word "mortgage" appear. Mortgages and charges are dealt with specifically in Part III. of the Act under the title "Registration of Charges," and there is an express provision in s. 79, sub-s. 10 (the section with which Part III. of the Act begins), that in this Part of the Act the expression "charge" includes "mortgage." A careful perusal of this Part of the Act makes it plain that the words "mortgage," "charge" and "debenture" still continue to be used as separate and distinct descriptive terms.

So far I feel no doubt that an ordinary mortgage of freehold property would not be included in the description "debenture." The defendants' argument that it is so included is based solely on the new definition of debenture to be found in s. 380 of the 1929 Act. It must be remembered that this definition only applies unless the context otherwise requires, and that there is a separate definition of "charge" as including "mortgage" in Part III. of the Act. It seems to me that s. 74 and the other sections classified with it under the heading "Special Provisions as to Debentures" are confined to debentures to the exclusion of mortgages which are dealt with in Part III. under the general heading "Charges," which by the ad hoc definition clause includes mortgages in the ordinary sense of the words. To hold otherwise would I think result in the conclusion that although the Companies Act, 1929, is a consolidating statute and must be construed ordinarily so as to exclude any amendment of the existing law, it has in fact effected an amendment by the extension of the definition of "debenture" in s. 380.

In the result I hold that s. 74 of the Companies Act, 1929, does not apply to the mortgage deed of November 6, 1931, and consequently has no application to prevent the operation of the equitable doctrine relating to unreasonable postponement of the period for redemption.

I have already expressed the opinion that in the present case the period of postponement for redemption for forty years, having regard to the provisions of the mortgage deed,

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offends against that doctrine, and I therefore hold that the plaintiff company is entitled to the declaration sought.

Solicitors: *Clifford-Turner & Co.; Sharpe, Pritchard & Co., for Bremner, Sons & Corlett, Liverpool.*

A. R. LL.-T.

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April 29;
May 2.

FOWKE *v.* FOWKE.

[1936. F. 1658.]

Deed of separation—Covenant by husband to pay annuity—Covenant by wife not to pledge husband's credit—Subsequent decree of nullity—Effect of decree on deed.

A decree of nullity of marriage, granted on the ground of the incapacity of the wife to consummate the marriage, does not affect a previous deed of separation, whereby the husband covenanted to pay the wife an annuity, so long as she should continue to lead a chaste life, and she covenanted to keep him indemnified against all debts and liabilities.

ACTION.

On May 17, 1911, a marriage was solemnized in London between the first-named plaintiff, Edith Crammond Fowke and Roger Warburton Fowke (hereinafter called "the "covenantor"), and thereafter they lived together in England and Ceylon. In 1930 the covenantor commenced proceedings in Ceylon for a judicial separation, but that matter was never adjudicated upon. By a deed dated February 10, 1931, and made between the covenantor, the first-named plaintiff and the plaintiffs Philip Fowke and Nigel Inglesant Lee (hereinafter called "the trustees") the covenantor agreed to pay to the first-named plaintiff a yearly sum of 960*l*., by equal monthly payments of 80*l*. each in advance on the first day of every month during her life and so long as she should continue to lead a chaste life, provided always that if in any year the annuity of 960*l*. should be more than one-third of the total income of the covenantor then in the succeeding year he should pay and she should accept a sum equivalent to one-third of his income for such past year, and she covenanted to keep him indemnified against all debts and liabilities, and the covenantor covenanted with the trustees that the covenantor would, within a period of five years, deposit, free of all incumbrances, with the trustees, and transfer to them and have duly registered in the books of the company, scrip for 5000 shares in Motor Launches, Ld., to be held by them as security for the due payment of the annuity, and, in the meantime, he covenanted to enter into a bond with the trustees for the payment of a sum of 200,000 rupees as security for the payment of the annuity, the bond to be discharged on his depositing and registering the scrip for 5000 shares as above mentioned. On the same day, February 10, 1931, a security bond was executed in accordance with the covenant.

The covenantor continued to pay the annuity of 960*l.* down to the date of his death, but he failed to pay or transfer the sum of 200,000 rupees to the trustees or to have transferred into their names the scrip for 5000 shares.

On December 4, 1933, the covenantor obtained in the Divorce Court a decree absolute of nullity of his marriage to the first-named plaintiff on the ground of her incapacity to consummate the marriage, the decree pronouncing and declaring "the said marriage to be and to have been "absolutely null and void and that the said petitioner was and "is free from all bond of marriage with the said respondent." Later in the same month the covenantor married the defendant. He died on February 14, 1934, having by a will dated June 13, 1933, left all his property to the defendant and appointed her sole executrix. After the death of the covenantor, the defendant failed to pay the annuity of 960*l.*, or to pay or transfer the 200,000 rupees to the trustees or to transfer and register the 5000 shares. In these circumstances the present action was brought, the first-named plaintiff claiming a declaration that on the true construction of the deed and the bond or one or other of them and in the events which had happened the defendant was bound to pay to the first-named plaintiff the annuity of 960*l.* There was also a claim by all the plaintiffs for payment of the arrears.

R. M. Wilson for plaintiffs. In the case of bigamy and in other cases the marriage is void ab initio, but, in the case of incapability of one of the parties to consummate the marriage, the marriage is only voidable—see Rayden and Mortimer on Divorce, 3rd ed., p. 35, and Halsbury's Laws of England, 2nd ed., vol. 10, pp. 639–40. Therefore, when the deed of separation was entered into, the parties were husband and wife in the eyes of the law and in the eyes of all the world and were capable of entering into this deed. A decree of nullity in such a case is in substance a decree for the dissolution of the marriage: see the judgment of Bateson J. in *Inverclyde* v. *Inverclyde.* (1) A deed such as this can be set aside on the ground of a mistake of fact: Anson on Contract, 17th ed., p. 153. There was no mistake of fact in this case; there could not possibly have been one. *Bell* v. *Lever Brothers, Ld.* (2), was almost on all fours with the present case, although in that case the parties were more liable to have made a mistake. There was mutual consideration in this case: the husband agreed to pay the wife an annuity and she agreed to keep him indemnified against all debts and liabilities. There is no reason for setting aside the deed. He also cited *Turner* v. *Thompson* (3) and *G.* v. *M.* (4)

William Latey and *Andrew Clark* for defendant. The form itself of the decree of nullity shows that there never was a marriage: see *Newbould* v. *Attorney-General.* (5) The parties, never having been married, could not enter into a deed of separation. A decree of nullity puts an end to any post-nuptial settlement or contract between the parties. Sect. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), only deals with property already brought into settlement. The nearest case to the present one is *In re Wombwell's Settlement* (6), where Russell J. held that the marriage had been null and void ab initio. *Nepean* v. *Nepean* (7) and *Dormer* v. *Ward* (8), deal with the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), and the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19). The effect of the decree here was that there never had been a marriage, whereas the whole idea of the deed is based on the assumption that there had been a marriage. Therefore there was no consideration for the deed. Cases where there was no marriage because of bigamy by one of the parties are analogous to the

(1) [1931] P. 29, 39.
(2) [1932] A. C. 161.
(3) (1888) 13 P. D. 37.
(4) (1885) 10 App. Cas. 171.
(5) [1931] P. 75.
(6) [1922] 2 Ch. 298.
(7) [1925] P. 97.
(8) [1901] P. 20.

present case: *Galloway* v. *Galloway* (1), *Law* v. *Harragin*. (2) Where there is a mutual mistake by the parties as to their rights, it is a mistake of facts, although it may rest on a mistake of law, and a contract entered into between them can be set aside: *Cooper* v. *Phibbs* (3); *Norwich Union Fire Insurance Society* v. *Wm. H. Price, Ld.* (4) The deed is bad and the defendant is in no sense legally bound to pay the annuity.

R. M. Wilson in reply. *Turner* v. *Thompson* (5) has an important bearing on this case. *Inverclyde* v. *Inverclyde* (6) has never been questioned. It must be borne in mind that the husband paid the annuity till his death. He may have entered into this deed knowing full well that he was entitled to a decree of nullity, but only applied for the decree when he met the defendant. Browne and Latey on Divorce, 11th ed., p. 123, deals with cases of nullity.

FARWELL J., after stating the facts, continued: In these circumstances, the question has arisen whether this separation deed is any longer binding upon the executrix of Roger Warburton Fowke. It is said that the fact that the marriage has been declared null and void by a decree of the Divorce Court has the effect of putting an end to this agreement, so that there is no obligation now upon the executrix to pay the annuity or any part of it. There can be no doubt, I think, on the authorities that the Divorce Court would have had jurisdiction to deal with this deed as a post-nuptial settlement notwithstanding that the decree was a decree of nullity and not a decree of divorce, and had there been an application by the husband in due time during his life, it may be that the Court would have seen fit to make some order in the matter. In fact, no such step was taken and the husband was content to go on paying the annuity to the first-named plaintiff down to the time of his death.

The question, which I think is not without difficulty, is this. It is said by the defendant that this deed was entered into under a common mistake of the parties that they were husband and wife and that in any case there was no consideration for the agreement, because the whole basis of it was that the parties were married and as married people had certain rights one against the other, which were being released by the deed, and that, if they never were man and wife, those rights never existed, and that consequently there was no consideration for the agreement, to pay the annuity which the husband agreed to pay by the deed, and accordingly the husband's executrix is now entitled to a declaration that the deed is null and void.

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(1) (1914) 30 Times L. R. 531.
(2) (1917) 33 Times L. R. 381.
(3) (1867) L. R. 2 H. L. 149.
(4) [1934] A. C. 455.
(5) 13 P. D. 37.
(6) [1931] P. 29.

On the other hand, it is contended that, although the marriage has been annulled, the agreement having been made before the decree of nullity, the executrix cannot escape from liability, and the estate continues to be liable to find the money which is properly payable in each year.

It was suggested late in the proceedings that the husband's executrix might be estopped from denying the validity of this agreement. It was said that the husband had proceeded on the footing, down to the time of his death, that this agreement was a binding agreement, and that it was too late now for the executrix to object that the agreement was not binding upon her. Estoppel was not pleaded and I do not think that it would be right for me to decide this question on that ground.

The difficulty in this case arises, in my view, from the anomalous position of two persons, both of them being, apart from any physical disability, free to contract marriage, who go through a ceremony of marriage, but whose marriage is subsequently annulled by the Divorce Court on the ground of the physical incapacity of one of the parties to consummate it. To constitute a valid marriage, i.e., one that is not voidable according to the law of this country, both parties must be physically capable of consummating it. If the marriage is not consummated, owing to the physical incapacity of one of the parties, the person aggrieved may by appropriate proceedings in the Divorce Court obtain a declaration that there is no marriage; that is to say, a declaration of nullity—

not merely a declaration that the marriage has been determined from a particular date or is dissolved from a particular date, but a declaration that the marriage is and has been absolutely null and void and that the petitioner was and is free from all bond of marriage with the respondent.

The result of such a decree is, at any rate as from its date, that the parties are not, and never have been, legally man and wife. In that respect the position of the parties to such an action differs wholly from that of persons whose marriage is dissolved by the Divorce Court upon the ground of some misconduct justifying the Court in granting a decree of divorce. The effect of such a decree is to dissolve the marriage as from the date of the decree, but it does not in any way affect the previous position of the two people as having been legally man and wife, and, although as from the decree absolute they are no longer man and wife and no longer under the mutual obligations arising from that relationship, they are none the less persons who have been married and have been man and wife in the legal sense of the word. On the other hand, as I have pointed out, in the case of a nullity decree the position is that there has never in law been a marriage at all and the parties have never been in law man and wife. Again the position differs, in my judgment, from that flowing from a decree of nullity on the ground of bigamy. In that case, bigamy being a criminal offence, a person who contracts a bigamous marriage contracts no marriage at all, and the union between the two parties can never be said to be, at any time, a union of two people as man and wife in the state of wedlock. It is impossible for a person who has a spouse living, and whose marriage has not been legally put an end to, to enter into a second marriage at all, and a so-called bigamous marriage is in law and in fact no marriage and is open to challenge by any one who desires to impeach its validity. Any person can give information which may lead to a prosecution of the guilty party for bigamy, or may take other steps in the matter to put an end to a wholly illegal position, notwithstanding the fact that the parties have gone through a ceremony which otherwise would have amounted to a marriage ceremony.

The difference in such a case from that of persons who are married but whose marriage has never been consummated owing to the physical disability of one of the parties is plain. In the case of such persons their position is that of man and wife in this sense: that no one can be heard to say that they are not legally married. To allege of two such persons, before any decree of nullity has been made, that they were living in sin, would, I apprehend, be slanderous and might give rise to a cause of action for damages by one or other of the parties or both of them. Moreover, their position is that of man and wife from all practical points of view. The husband, for instance, is bound to maintain the wife, and the wife, if she is not maintained, is entitled to pledge his credit, and, if she pledges his credit, and a tradesman then sues the husband, it is not open to the husband in those proceedings to plead that the lady was not his wife, nor would it be open to the tradesman to set up that there never had been a valid marriage. So long as neither the husband nor the wife have taken proceedings in the Divorce Court and obtained a decree of nullity, those two persons are to all intents and purposes married people. But the moment a decree of nullity is pronounced the position becomes wholly different and there is then no marriage and never has been a marriage. That is well illustrated by such a case as *In re Wombwell's Settlement.* (1) In that case two parties were intending to get married and a settlement was made under which the father of one of the parties settled a sum of money to be held upon trust for him until the marriage, and after the marriage upon trust for the beneficiaries under the trust—the usual marriage settlement. The parties went through a ceremony of marriage and subsequently lived together, but the marriage was not consummated owing to the incapacity of the husband. The wife duly obtained a decree of nullity and on that the settlor claimed that he was entitled to recover the stocks and shares which he had transferred to the trustees of the marriage settlement on the ground that there never had been a marriage at all, and as the trust was for him until marriage, he was the only beneficiary who was entitled to the funds and he could call upon the trustees to hand over the funds to him. Russell J. held that the claim was well founded, but he was careful to point out that neither party desired to make any application to the Divorce Court to have the settlement varied, which they clearly could have done, and he was therefore free to direct the trustees to re-transfer the securities to the settlor. The ground of that decision, in my judgment, is plain—that the decree of nullity having been made, there never had been a marriage at all, and, there never having been a marriage, the only trust of the settlement which was effective was the trust for the settlor, and he, being the sole beneficiary, was entitled to have the funds back. That illustrates the fact that the marriage is not a marriage; once the decree of nullity has been made the marriage is not and never has been a legal marriage at all.

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(1) [1922] 2 Ch. 298.

But none the less, the position, odd as it may seem, is in my judgment this: that notwithstanding it is ultimately decided that there is no marriage, until that is decided and the decree has been made, the parties are man and wife for all intents and purposes. They themselves are treated and must be treated as man and wife and their dealings with the outside world, with third parties, can only be on the footing that they are man and wife; so, if two persons go through a ceremony of marriage and live together until the death of one of them, neither of them having obtained a decree of nullity although the marriage has never been consummated owing to incapacity, they remain for all time having the status of married people, and the obligations and benefits which flow from that status are theirs, and the fact that the marriage has not been consummated cannot be set up by any one and their position as married people is unassailable. So that whereas, in the case of a bigamous marriage, any one may attack the validity of the marriage, and in no sense and for no purpose whatsoever are those two people who have joined together in a bigamous marriage man and wife, in the case of a marriage of this sort, to all intents and purposes their position is that of man and wife, and the results which flow from that position are the same as in the case of any other legal marriage unless and until a decree of nullity is pronounced.

Now if that be true, then I have to consider what is the position of the parties in relation to an agreement entered into between themselves during the time when they are living as man and wife and before any decree of nullity has been made or before there has been any question of any such decree being made. In this case the parties, as a result of unhappy differences, were contemplating living apart and they were contemplating regularizing that position by obtaining a judicial separation; but instead of that this agreement was entered into, which was honoured by the husband down to the time of his death, and which the first-named plaintiff claims must still be honoured by the executrix. It is said that this agreement is not enforceable now—and I think it must follow, was not enforceable at any time after the decree absolute had been made—because the whole foundation of this contract was that the parties were husband and wife. It is said that it was in order to relieve the parties from the obligations resulting from that status, so far as was possible apart from a divorce or decree of nullity, that this deed was entered into. It is said further that in those circumstances there was no consideration for this agreement and it is not binding upon them.

In my judgment this agreement is one which the first-named plaintiff is entitled to enforce. It is, I think, impossible to say that this agreement was entered into under such a mistake of fact as would entitle either party to have it declared void. In the first place, there was no mistake of fact—there could have been no mistake of fact—so far as the fact consisted in the non-consummation of the marriage. Both parties must have been perfectly well aware of that. Whether either of them knew, when they entered into this deed, that the husband might be entitled, under certain circumstances, to obtain a decree of nullity in the Divorce Court, is a matter of which I know nothing; but that ignorance, if there was such ignorance, in my judgment is clearly a mistake of law and not a mistake of fact. The relevant fact was known to both parties, and under those circumstances it seems to me impossible to say that this was an agreement entered into by the parties under such a common mistake of fact as would entitle the Court to set it aside. Further than that, the position between the parties was at the time when this document was entered into such that they were, as I have said, married persons for all purposes. So far as outsiders were concerned, their status was that of married people. The husband was under an obligation to maintain his wife. The wife had the right to pledge his credit if he did not provide her with maintenance. Those rights were existing rights at the date of this document and rights which the parties were entitled to enforce. It would have been, as I have said, impossible in the case of a person giving credit to the wife to set up subsequently that there was no marriage between the parties unless and until a decree of nullity had been made. So long as there was no such decree, it was impossible for any one, including the parties themselves, to put themselves in any position which was inconsistent with their status as man and wife. I say that because, in my judgment, the only place in which the person aggrieved, in a case of this kind, can assert that there is no marriage is in the Divorce Court in proper proceedings to obtain a decree of nullity, and it is not for the person aggrieved, be it he or she, to set up the invalidity of the marriage in any proceedings other than the appropriate proceedings in the Divorce Court; so that it is not true to say that, although there was not a marriage in the legal sense of the word, the status of the parties was so different from that of married people as to render this agreement one for which there was no real justification at all. These two people were not in the position of two persons who had contracted a bigamous marriage. They were persons who for all material purposes were man and wife until the date when the decree absolute was made, and in those circumstances an agreement entered into on the basis that they were man and wife, at a time when there was no question of a decree of nullity, is in my judgment a contract which remains enforceable, even though subsequently one of the parties obtains the decree which the husband obtained in this case.

Further, in my judgment it is impossible to say that there is no consideration for this agreement. It is plain, as I have pointed out more than once in my judgment, that the lady could have pledged her husband's credit and the husband would be liable—that is before the decree absolute was made; and the wife was abandoning that right to pledge his credit in consideration, among other things, of the yearly payment. The husband was putting himself in a position where he was getting, as a consideration for the agreement, the right to prevent his wife from pledging his credit, and in any action which a person who gave credit to the wife chose to bring against the husband on the ground that she had acted as his agent to contract a debt, the husband would have an answer, and a complete answer, in this separation deed, and he would thereby obtain the benefits of the separation deed, and certainly throughout the whole period until the decree absolute was made, the husband obtained the advantage of being relieved from a liability to maintain his wife beyond payment of the yearly sum agreed—a liability from which he could not otherwise have divorced himself—and the wife obtained, as part of the consideration moving to her, the yearly sum which this agreement provides.

In my judgment, therefore, it is not possible to say either that this agreement is one which is not enforceable on the ground that it was entered into under such a common mistake as would justify the Court in setting it aside or on the ground that there was no consideration to support the agreement. Further, it must be borne in mind that for several years, from 1931 down to the date of the decree absolute, the agreement was binding upon the plaintiff, and on receiving the yearly income payable to her under it she gave up her rights, which as the wife of the covenantor she might otherwise have asserted. It seems to me that on that ground it must be true to say that this is an agreement which cannot be avoided, because it is not possible to make restitutio in integrum, which is a necessary condition of so doing. Under the circumstances, I have come to the conclusion that this agreement is one which is binding on the executrix of the husband and must be honoured by her.

That leaves me to deal only with quite a short question of construction of the agreement: namely, whether the provision in the agreement, which reduces the liability of the covenantor to pay 960*l.* a year to the equivalent of one-third of his income, is one which applies after his death as well as before. The income of the estate is, I understand, less than 960*l.* a year, and, if the provision reducing that amount applies, the actual sum payable in each year is a question of account. It is to be noticed that the various covenants by the covenantor to pay the annuity and otherwise are covenants by himself and there is no mention of his executors and others. But notwithstanding the omission of such words, it has rightly not been contended that the liability to pay the annuity ceased at the death of the covenantor. It is appreciated, rightly, that his liability is not limited to his lifetime but it extends after his death during the lifetime of the plaintiff, and that consequently the annuity is still payable.

Now, if the true view be, as I have no doubt that it is, that the covenantor's estate remains liable, and his executrix is under an obligation to honour his covenants so as to cast a burden upon the estate, I myself wholly fail to see why she is not entitled to have the benefit of the relief which is given to the covenantor by this provision as to reduction of the annuity. I do not think that I can say that whereas the covenantor himself was under the obligation and entitled to the relief, the executrix is in so much worse a position that she remains under the liability, but is not entitled to the relief which the testator would have had. I can see nothing in the document itself which compels me to come to a conclusion, which I think would be an unjust conclusion.

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Fowke v. Fowke.

The parties could have provided expressly for such a position if they had desired to make the annuity payable at the full rate after the death of the covenantor, but there is nothing in the document, to my mind, which imposes on me an obligation to find that the executrix is not entitled to relief to the extent which I have stated, and I have come to the conclusion that, on the true construction of the document, if, say, at the end of the year in which the testator died the income was less than 960*l.*, then the liability of the executrix was accordingly reduced, and in each year succeeding his death the executrix again, if the income of the whole of the estate is less than 960*l.*, is entitled to the relief which is given by the settlement.

That disposes of the action and I will make a declaration that on the true construction of the separation deed, and in the events which have happened, the defendant is bound to pay to the first-named plaintiff out of the estate of the covenantor, the annuity of 960*l.* during the life of the plaintiff or the amount equivalent to one-third of the income of the estate for the preceding year, during the life of the plaintiff so long as she shall continue to live a chaste life. The plaintiff is entitled to the costs of the action.

Solicitor for plaintiffs: *G. F. Wilkins.*
Solicitors for defendant: *Pickering, Kenyon & Co.*

P. J. B.

BRITISH METAL CORPORATION, LIMITED v. LUDLOW BROTHERS (1913), LIMITED.

FARWELL J.
1938
May 20.

[1937. B. 3725.]

Costs—Taxation—Two counsel engaged for both parties in Court of Appeal—Subject-matter of dispute of interest to persons not parties to proceedings—Disallowance of costs of one counsel—Discretion of taxing-master.

There was a dispute between B. Co. and L. Co. with regard to the price of a certain metal. The matter went to arbitration under the rules of the Metal Exchange, and an award was made. L. Co. was dissatisfied with the award and took proceedings in the High Court to set aside the award. The matter came before Clauson J., who held that the award was bad.

B. Co. appealed against that decision. When the case came before Clauson J., each party was represented by one counsel. After notice of appeal had been given, L. Co.'s solicitors wrote to B. Co.'s solicitors to say that, unless the latter were instructing a leader, they would leave the matter in the hands of the counsel who represented them in the proceedings before Clauson J. B. Co.'s solicitors, in reply to that letter, stated that they were briefing a leader to appear in the Court of Appeal. L. Co.'s solicitors then briefed a second junior counsel. The Court of Appeal dismissed the appeal and ordered the B. Co. to pay the costs. The subject-matter of the dispute was of great interest to many persons, other than the parties. The taxing-master disallowed all the fees of the second counsel briefed on behalf of L. Co. in the Court of Appeal:—

Held, that the taxing-master ought to have taken into consideration the fact that the matter in question was of importance to a large number of persons and, in the circumstances of the case, have allowed the costs of briefing a second counsel in the Court of Appeal.

ADJOURNED SUMMONS.

The facts appear from the judgment.

R. A. Willes for the applicants, Ludlow Brothers (1913), Ld.

John F. F. Platts-Mills for the respondents on the summons, British Metal Corporation, Ld.

FARWELL J. This is a question of the taxation of certain costs. The matter arises in this way: there was a dispute between the two parties as to the price of a certain metal, and under the rules governing the Metal Exchange, the matter had necessarily to be referred to the arbitration of a particular tribunal set up by those rules. Those rules prohibited the parties appearing by counsel or solicitors, and required them to appear themselves before the tribunal. In this case, two arbitrators heard the arguments of the parties, and ultimately an award was made. That award was signed by three persons as umpires. The applicants in this case (who were respondents in the Court of Appeal, and are hereinafter called " the respondents ") were dissatisfied, and accordingly proceedings were taken in the High Court to have the award set aside on the ground that it was bad on the face of it. The point taken was that the arbitration was heard by two arbitrators, but the award was signed, or appeared to be signed, by three arbitrators. The award therefore appeared to be an award of two persons who had heard the arguments, and one person who had not, and on that it was said that the award could not stand. The matter came before Clauson J., and he decided on the construction of the rules, which no doubt were complicated and required elucidation, that the award was bad on the face of it, and he set it aside. The respondents here (who were appellants in the Court of Appeal and are hereinafter called " the appellants ") were dissatisfied with that decision, and accordingly took the matter to the Court of Appeal. The Court of Appeal dismissed the appeal, and ordered the appellants to pay the costs. When the matter came before Clauson J., Mr. Willes appeared for the respondents, and Mr. Platts-Mills for the appellants. Before the appeal came on, but after notice of appeal had been given, Mr. Willes' clients wrote to the appellants' solicitors in these terms: "Unless you are instructed to brief a leader, Messrs. Shake-"speare & Vernon (Ludlow Brothers (1913) Limited's solicitors) "will be content to leave the matter in the hands of Mr. Willes," to which the appellants' solicitors, Messrs. Linklaters & Paines, replied: " We are instructing a leader on behalf of our clients." Then Mr. Willes' clients replied: " As you have instructed "two counsel, we have briefed Mr. R. A. Willes and Mr. L. H. "Gluckstein." The costs were taxed in due course by the taxing-master, and he disallowed all the fees of the second counsel, Mr. L. H. Gluckstein, and to that the respondents took objection. The answers to the objections are these: "These "objections are to my disallowance of the brief to Mr. Gluck-"stein on the hearing of an appeal from the order of Clauson J., "dated October 22, 1937. On the hearing before Clauson J. "both sides briefed junior counsel only—Mr. R. A. Willes "appearing as counsel for these respondents. On November 12, "1937, respondents' solicitors wrote appellants solicitors with "reference to the appeal." Then he states the effect of the letters which I have read, and he says: "As is well known "by Order 65, Rule 27 (regulation 47), where costs of retaining "two counsel may be properly allowed, such allowance may "be made although both counsel may be selected from the "outer Bar, and such allowance is always made where proper." It is clear from the taxing-master's answers to objections that he was not disallowing junior counsel's fees on the ground that Mr. Willes was appearing on the appeal with a junior. If that had been the ground on which the fees were disallowed, the objection would have been fully justified. Then the learned taxing-master goes on: "Notwithstanding the fact "that the appellants instructed a leader I am of opinion, "having regard to all the circumstances of the case that there "was no justification for the respondents briefing a junior to "a counsel of such experience as Mr. Willes to assist him in "supporting in the Court of Appeal an order which he had "obtained in the Court below. I therefore overrule the "objections." On that, the matter comes before me, and I have to consider whether I can properly interfere with what the taxing-master has done. I myself not very long ago had to consider the question of how far this Court ought to interfere with the taxing-master when he has refused to allow the costs of leading counsel. The case is *In re W. T. Potts* (1). It is a different case from this in its circumstances. It was a question as to briefing leading counsel before the registrar in bankruptcy upon an application to approve a scheme of composition. There were other parties to the proceedings who had not briefed leading counsel, although one of the parties did, in fact, brief leading counsel. The taxing-master had disallowed the fees of leading counsel in that case on the ground (inter alia) that leading counsel should not be briefed before the registrar in bankruptcy on an application of that kind. The facts, of course, are quite different from these, but I think the principles which I ventured to state in that case are applicable here.

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(1) [1935] Ch. 334.

There cannot, I think, be any doubt that this is a matter in which I ought not to interfere with the discretion of the taxing-master, unless I am satisfied that he has proceeded on some wrong basis. The taxing-master was, I think, right in disregarding the fact that Mr. Willes' opponents in the Court of Appeal had thought it necessary to take in leading counsel. That in itself is not, in my view, sufficient to justify leading counsel being briefed on the other side. Each case must depend on its own facts, but it would not be right to say that in every case, because one side takes in leading counsel, the other side is justified in employing leading counsel. In this case I cannot wholly disregard the fact that the respondents' solicitors took the precaution of suggesting to the other side that the matter might be left to junior counsel. The response to that was that the appellants were going to take in leading counsel. So that the employment of two counsel was to some extent invited in this particular case by the appellants' solicitors, but I do not think that alone would be enough to justify me in interfering with the taxing-master's discretion. It must, however, be remembered that the matter had been fully considered and determined by Clauson J. and that it was a question of the construction of the rules of the Metal Exchange relating to arbitration, which may be a matter of general importance to persons engaged in that trade. The matter, therefore, was not one of importance merely to the parties, but was a question which might be of importance in other cases, and although I sympathize with the taxing-master's view that Mr. Willes is a counsel of so much experience that he would hardly need the assistance of a junior, at the same time, there is always the possibility that counsel may at the moment when he is required in Court be actually occupied elsewhere, and unable to be in the Court when required; and again, it is possible that however able counsel may be, second counsel may be able to present the case in a way which appeals to the tribunal more than the way in which it was presented by the counsel who addresses it first. I think in this case that the taxing-master ought to have taken into account the facts that the matter was one, not merely of importance to the immediate parties, but was a matter of some general importance, and that the other side had thought it right to employ, and to state that they were employing, the services of very eminent leading counsel to assist them on the hearing of the appeal. Although I entirely accept the view that the matter is prima facie a matter of discretion, and one with which I ought not prima facie to interfere, I have come to the conclusion that the learned taxing-master did not proceed in this case on a proper basis, because he failed to take into consideration the fact that the matter was not merely of importance to the parties themselves. Further, the fact that leading counsel had been briefed on the other side, although not in itself sufficient ground for allowing the fees of second counsel, was in this case a matter which, having regard to the circumstances, he might well have treated as justifying the respondents' solicitors in the Court of Appeal in thinking that it was necessary for the proper assistance of the Court, and for the proper protection of their clients, that their clients should have not less assistance from counsel than their opponents received. I find it difficult to appreciate exactly what the ground is on which the discretion of the taxing-master is said to have been exercised. So far as I understand his answers to objections, they rest on the experience of Mr. Willes. I do not think that that is sufficient ground for exercising his discretion in the way he did. He ought to have taken in consideration all the circumstances—namely, this was a case of some general importance, that it was a case in the Court of Appeal where the other side had already stated their intention of briefing leading counsel, and that therefore the solicitors instructing Mr. Willes might properly take the view that the

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case was one where the employment of two counsel was a proper precaution to ensure that the case should be fully presented to the Court and the client be properly protected.

For these reasons I think that I ought to allow this objection, and I propose, therefore, to do so. Mr. Willes' clients are entitled to the costs of this application.

Solicitors for applicants: *Peacock & Goddard, for Shakespeare & Vernon, Birmingham.*

Solicitors for respondents: *Linklaters & Paines.*

P. J. B.

In re NEAVE.

NEAVE *v.* NEAVE.

[1938. N. 332.]

FARWELL
J.

1938
June 2.

Power of appointment—Special power—Share of residue settled upon appointees—Proviso that appointees should, under the equitable doctrine of election, be bound to settle appointed shares—Proviso invalid.

Not followed. In re SIMPSON [1952] 1 Ch. 412

A testator, in exercise of a special power of appointment, conferred on him, as the survivor of his wife, by a marriage settlement, dated April 29, 1878, and a further settlement, dated December 26, 1896, appointed that the trustees of both settlements should, after his death, stand possessed of the property subject to the trusts, in trust as to three-fourth parts for a named son and as to the remaining fourth part for another named son: "Provided "always and I declare that each of my sons shall under the "equitable doctrine of election be bound within such time as my "trustees shall appoint to settle at the cost of my estate and to "the satisfaction of my trustees his appointed share under each "of the said settlements upon the trusts hereinafter declared "concerning his share in my residuary estate and so as to form "one fund therewith for all purposes and my trustees may at "their absolute discretion decide any question as to the amount "and manner in which in case of default compensation is to be "made."

The testator settled his residuary estate upon trusts in favour of the same two sons and their issue in the same proportions:—

Held, that the conditions sought to be imposed by the proviso were ineffective and invalid, and that the sons took under the appointment free from any such conditions.

ADJOURNED SUMMONS.

By his will, dated July 20, 1936, the testator appointed the plaintiff and the defendant Sheffield Airey Neave to be his executors and trustees. By para. 5 he declared that, in exercise of the powers conferred on him as survivor of his wife, by a marriage settlement, dated April 29, 1878, and a further settlement, dated December 26, 1896, he appointed that the trustees of both settlements should, after his death, stand possessed of the property subject to the trusts, in trust as to three-fourth parts for his son, the defendant S. A. Neave and as to the remaining fourth part for his son, the defendant Richard Neave; "Provided always and I declare that each "of my sons shall under the equitable doctrine of election be "bound within such time as my trustees shall appoint to "settle at the cost of my estate and to the satisfaction of my "trustees his appointed share under each of the said settlements "upon the trusts hereinafter declared concerning his share in "my residuary estate and so as to form one fund therewith "for all purposes and my trustees may at their absolute "discretion decide any question as to the amount and manner "in which in case of default compensation is to be made." By para. 8 the testator devised and bequeathed all his real and personal estate, not otherwise disposed of, to his trustees upon trust for sale and conversion and, after payment of his funeral and testamentary expenses and debts and legacies, to stand possessed of the remainder thereof as to three-fourth parts on the trusts thereinafter declared for the defendant, S. A. Neave, and as to one-fourth part upon the trusts thereinafter declared for the defendant R. Neave. By para. 9 he directed that the respective shares of his residuary estate of each of his sons should be retained and invested by his trustees upon the following trusts: (*a*) the income of the share of the defendant, S. A. Neave, should be paid to him during his life, but the income of the share of the defendant R. Neave should be held by the trustees for his benefit, during his life, on the protective trusts declared by s. 33 of the Trustee Act, 1925 (15 Geo. 5, c. 19). (*b*) From and after the decease of either of his sons, his share in the income should be held upon trust for such one or more of his male issue immediately or more remote as he should by deed, will or codicil appoint: (*c*) In default of and subject to such appointment, such share should be held in trust for all his sons who should attain twenty-one, if more than one, in equal shares.

The testator died on October 24, 1936, leaving his two sons him surviving. The defendant S. A. Neave has had two sons, the defendant, Airey Middleton Sheffield Neave, and the infant defendant, Digby John Sheffield Neave, and the defendant R. Neave has had two sons, the infant defendants, Robert Morier Sheffield Neave and Julius Arthur Sheffield Neave.

The defendants S. A. Neave and R. Neave did not desire to settle the shares of the funds subject to the trusts of the two settlements appointed to them by the testator's will. In these circumstances the plaintiff took out this summons asking whether, having regard to the directions given in para. 5 of the testator's will and on the true construction of the will, the trustees ought, in the event of one or other or both of the defendants failing to make the settlements directed by the proviso, in order to compensate the persons who would have benefited under such settlement, to accumulate the income of the testator's residuary estate payable to the defendant S. A. Neave, or held upon protective trusts for the benefit of the defendant R. Neave, as an accretion to the capital of such residuary estate during the lifetime of such defendant or until the expiration of twenty-one years from the death of the testator or until the value of such accumulations should equal the value of the funds, subject to the trusts of the settlements, appointed to such defendant, whichever should be the shorter period. The summons also asked that directions might be given to the trustees as to what other steps they ought to take to give effect to the directions in the proviso or that it might be declared that such directions were null and of no effect.

P. H. L. Brough for the plaintiff. The only question of interest in this case arises on the direction to settle shares, appointed in exercise of powers, contained in the proviso to clause 5 of the will. This was taken from a form in Prideaux' Precedents in Conveyancing, ed. 23, vol. 3, p. 785*n*.

Andrew Clark for S. A. Neave. In *In re Oliver's Settlement* (1) it was held that where an appointment was void for perpetuity no question of election arose. The Court will not allow the application of the doctrine of election where there is an attempt to modify the interest appointed under a power of appointment: see Farwell on Powers, ed. 2, p. 382. A qualifying trust cannot take away from an original gift given

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(1) [1905] 1 Ch. 191.

FARWELL J.
1938
NEAVE, *In re.*
NEAVE *v.* NEAVE.

under a power of appointment. The whole of the proviso in clause 5 of the will is bad. The effect of the last part of the proviso is to give the trustees a roving commission to impose what terms they like on beneficiaries who do not elect. The testator leaves it to the trustees to make his will, which is always against the law.

A. C. Nesbitt for the infants. The doctrine of election applies to appointments under powers: see Farwell on Powers, ed. 2, p. 377. The question of election is discussed in *Churchill* v. *Churchill.* (1) The question is also raised in *King* v. *King* (2), which is referred to in Farwell on Powers, ed. 2, p. 382. If a son of the testator does not elect to settle, as provided by the will, the trustees should hold his appointed share in trust for his children.

Hon. Denys Buckley and *E. Riviere* for other parties.

FARWELL J. This summons raises an interesting question as to the effect of an appointment under a special power and what is called in the will the equitable doctrine of election.

In considering a case of this sort it is important to bear in mind what is really very elementary—namely, the distinction between property and power. Where a person has a special power of appointment over property, he has no right to do anything more than dispose of the property subject to the power, in a way which is within the four walls of the provisions contained in the instrument creating the power. The property is not the appointor's property in any sense of the word; he cannot do with it as he pleases; he can only dispose of it in accordance with the express provisions of the settlement which created the power. On the other hand, a man may dispose of his own property as he pleases, subject to the ordinary rules of law. He may give it by deed or will to whom he pleases and he may impose any condition, within the rules of law, which he thinks fit as a term of his bounty. That must be borne in mind in considering what is the effect of this will. So far as the appointment to the two sons is concerned, there can be no possible objection to it. It is an absolute appointment to each of the two sons; the two sons were both of them objects of the power under the settlements and the testator was entitled to exercise the power, as he did, by appointing the property, as he has done, to them. So far there is no difficulty. But then he has sought to impose as a condition upon the two sons in connection with their enjoyment of the property, which they take under the power, that they shall settle the appointed property in a way which, if such settlement had been contained in the appointment itself, would have rendered the appointment invalid on the ground that it was in excess of the power. A testator cannot validly impose any such condition as to the enjoyment of the property which he is appointing under a special power and such condition is wholly ineffective. But a testator may do this; he may say: "I exercise the special power of appointment in favour "of the objects of the power and I give a portion of my own "property, to those objects, but if those objects do not make a "settlement of the property which they take under the "appointment then they shall forfeit what they would otherwise "have taken out of my own property." It is said in this case that on the true construction of this will that is really what the testator has done; he has said: "I make an appointment, "an absolute appointment, to both my sons; I give them "interests in my residuary estate; but if they do not make "the settlement which I wish them to make of the appointed "property—a settlement which I cannot oblige them to make "but which I desire them to make—they are then to take a "smaller portion of my residuary estate." It is said that, if I read the will as a whole, that is the true construction of it. If that be the true construction, it is a very clumsy way of doing what could have been done perfectly simply; but it may be that that is what the testator had in mind and from the reference to the equitable doctrine of election it may be possible to extract from the will as a whole the construction which I am asked to put upon it. So far as this is an attempt to interfere with the property given under the appointment to the two sons directly, it obviously cannot take effect at all: so far as it is intended to limit by way of compensation the share which the sons take out of the testator's own property, it may be a valid provision ; but even if I read this provision as to compensation as not referring to anything more than such interests as the sons take in the testator's own property, still I am left in a great difficulty because, assuming that to be the true construction of the will, it is left wholly in the hands of the trustees to say how the residuary estate is to be disposed of. If the sons refuse to make the settlement, which the testator desired them to make, what is the destination of the residuary estate ? One son takes a life interest, the other takes a protective life interest in the testator's property and there are gifts over to their children and their issue. It is wholly a matter for the trustees to say what compensation is to be made, and how it is to be made, and in effect it is for the trustees to say, how in those circumstances the residuary estate of the testator is to be disposed of. That, in my judgment, is something which the law does not permit. It is well settled that a testator cannot, except by way of a power of appointment, leave it to some one else to say how his property shall be disposed of, and that is what this testator has tried to do. He has said that it shall be a matter for the trustees, if his sons do not make the settlement, to say how the residuary estate shall go, whether the sons shall take any benefit and if so what or whether they shall be cut out altogether and the property go direct to the children of the sons. In that way it is a matter for the trustees to determine the destination of the testator's residuary estate. In those circumstances, even if I read this condition as a condition relating, not to the settled property, but to the testator's own property, the condition attempted to be imposed by the testator, is, in my judgment, ineffective because it is such a condition as the law will not recognize.

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(1) (1867) L. R. 5 Eq. 44.

(2) (1864) 15 Ir. Ch. Rep. 479.

The result is that the original appointment, which is a perfectly good appointment, must stand and the sons take their appointed shares free from any condition which the testator has sought in vain to impose upon them.

Solicitors : *Pennington & Son ; Young, Jones & Co.*

P. J. B.

In re SINCLAIR'S LIFE POLICY.

FARWELL J.

1938

June 1.

[1937. S. 716.]

Insurance—Endowment policy—Policy money payable at end of seventeen years to godson of assured if then alive—Death of assured within period—Godson not party to contract—No trust in favour of godson —Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 56, *sub-s.* 1 ; *s.* 205, *sub-s.* 1 (*xx.*).

In 1919, J. G. S. took out an endowment policy in his own name for the benefit of his godson to mature in seventeen years. J. G. S. died in 1924 :—

Held, that there was no trust in favour of the godson.

In re Engelbach's Estate [1924] 2 Ch. 348 followed.

Sect. 56, sub-s. 1, of the Law of Property Act, 1925, provides that "A person may take an immediate or other interest in "land or other property, or the benefit of any condition, right "of entry, covenant or agreement over or respecting land or "other property, although he may not be named as a party to "the conveyance or other instrument" :—

Held, that the section gave no beneficial interest in the policy money to the godson, and that it formed part of the estate of J. G. S.

ADJOURNED SUMMONS.

This was a summons taken out by Hervey Cecil Rowan Hopwood, an infant, by his father and next friend, Hervey Hopwood, against the executors of James Graeme Sinclair, asking for the determination of the question whether certain moneys, which were paid into Court to the credit of this matter under a policy of life insurance by the Sun Life Assurance Company of Canada, belonged to and were payable to the infant applicant or whether they formed part of the estate of J. G. Sinclair.

The infant applicant was born on April 13, 1919, in Ceylon. J. G. Sinclair, at the request of the infant's father, acted as one of his godfathers. On November 1, 1919, J. G. Sinclair signed an insurance proposal form, which was headed " Special child's "endowment," issued by the Shanghai Life Insurance Company (now represented by the Sun Life Assurance Company of Canada). In the proposal form J. G. Sinclair described

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himself as godfather of the infant, and he gave the name and age of the infant, to be referred to in the policy as the "nominee." Then followed details of the policy desired. The endowment was to mature in seventeen years, and the premium was to be paid yearly, subject to the following provisions: (*a*) In the event of the death of the applicant, J. G. Sinclair, the policy was to be continued to maturity, except as provided in provision " B," without further payment of premiums; (*b*) In the event of the death of the infant, whether occurring before or after the death of the applicant, all premiums paid, together with simple interest at the rate of 3½ per cent. per annum, should be payable to the applicant if living, or if not living to his legal personal representatives, and the policy should cease to be in force; (*c*) the policy should participate in the profits of the company if continued in force until the end of the endowment; (*d*) the policy should, at the termination of the endowment period, be payable either to the applicant signing the application or the infant. Then the question was asked: " Is the policy to be payable "at the end of the endowment to the applicant signing this "application or to the child ? " In answer to that question the word " applicant " was struck out and the words " to the child " were inserted. The policy itself, dated November 29, 1919, carried into effect the provisions contained in the application. It also contained an option of surrender, which provided that after three years' premiums had been paid, the assured, J. G. Sinclair, might, upon giving written notice to the company, within two months after any default in payment of premium, but not later, surrender the policy to the company. The policy was to date from November 1, the date of the signing of the application. Subsequently J. G. Sinclair handed the policy to H. Hopwood, the infant applicant's father, and told him to retain it so that he could in due course collect payment for his son.

J. G. Sinclair died on May 30, 1924, and the policy matured on November 1, 1936.

G. P. Slade for the infant applicant. This matter has already come before Luxmoore J., and, although the learned judge decided nothing, he suggested that s. 56, sub-s. 1, of the Law of Property Act, 1925, might affect it. Apart from that question, the question of whether Sinclair created a trust in favour of the applicant arises. The proposal form, the policy itself, and all the circumstances of the case go to show that it was the real intention of Sinclair to make himself a trustee or to be a donor of a gift. That intention ought to be given effect to. The decision of Romer J. in *In re Engelbach's Estate* (1) is against this contention, but the facts in this case are stronger.

Under s. 56, sub-s. 1, the fact that the applicant was not a party to the policy does not affect his right to sue on the policy: *In re Ecclesiastical Commissioners for England's Conveyance.* (2) He is a party who was given something under the policy: see judgment of Simonds J. in *White* v. *Bijou Mansions, Ld.* (3), where he approves of the judgment of Luxmoore J. in *In re Ecclesiastical Commissioners for England's Conveyance.* (2) The point is also dealt with by Sir Wilfrid Greene M.R. in the Court of Appeal in *White* v. *Bijou Mansions, Ld.* (4) Sect. 205, sub-s. 1 (xx.), defines "property" as including any thing in action, and any interest in real or personal property. If, therefore, the applicant's claim comes within s. 56, what he is claiming is "property."

[He also referred to *In re Clay's Policy of Assurance* (5), where *In re Engelbach's Estate* (1) was followed.]

E. J. Heckscher for respondents. There can be no question of a trust here, as there was no covenant. It was only by paying the premiums that Sinclair made it a real policy. He could at any time have ceased to pay the premiums and surrendered the policy.

There is nothing in s. 56 which supports the claim of the appellant. Neither that section nor any doctrine of trust can help him. The policy money belongs to Sinclair's estate.

FARWELL J. This is a summons taken out by Hervey

(1) [1924] 2 Ch. 348.
(2) [1936] Ch. 430, 438.
(3) [1937] Ch. 610, 624-5-6.
(4) Ante pp. 351, 364.
(5) [1937] 2 All E. R. 548.

Cecil Rowan Hopwood, an infant, by his father and next friend, Hervey Hopwood, against the executors of James Graeme Sinclair, asking for the determination of the question whether certain moneys which were paid into Court to the credit of this matter under a policy of life insurance by the Sun Life Assurance Company of Canada, belong to and are payable to the applicant infant, or whether they form part of the estate of James Graeme Sinclair. James Sinclair's executors are here in a representative capacity, and are bound, whatever their feelings might be in the matter, to claim this money which, if they are entitled to it, forms part of James Sinclair's estate.

The claim to these policy moneys on behalf of the infant is put in two ways. It is said first that the effect of this insurance effected by Mr. Sinclair on his life on behalf of the infant under all the circumstances, and having regard to the terms of the proposal and the policy itself, is sufficient to establish a trust in favour of the infant ; that is to say, that Mr. Sinclair declared himself a trustee of the policy moneys, if and when he received them, for the infant, and that the infant is therefore now entitled to claim as against the legal personal representatives of Mr. Sinclair that they hold the same on trust for him, the infant. In my judgment, the circumstances in this case are not sufficient to enable me to say that any such trust has been proved. There is no doubt, I think, on the evidence that Mr. Sinclair was desirous of making some provision for his godson, and that he contemplated doing it by means of this policy on his life ; but that is a very long way from saying that he thereby constituted himself a trustee of the moneys payable under the policy. I think that the evidence falls short of that which would be necessary to constitute such a trust.

I have been referred to two cases which are not dissimilar to this : one of them is a decision of Romer J. in *In re Engelbach's Estate.* (1) In that case the headnote is : "An "endowment policy taken out by a person in his own name "for the benefit of his daughter, to mature on her attaining

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(1) [1924] 2 Ch. 348.

"a specified age, creates no legal estate in the daughter, and "she cannot sue on the contract, nor does the assured thereby "constitute himself a trustee for his daughter of the policy "and of the moneys payable thereunder. If, therefore, the "assured dies before the policy matures, the policy moneys "belong, not to the daughter, but to the estate of the assured, "and must be paid to his executors." In that case Romer J. followed the decision in *Cleaver* v. *Mutual Reserve Fund Life Association.* (1) The facts in the present case are not exactly similar to the facts in the case before Romer J., but it seems to me that, applying the principle of that decision, I am bound to hold there is not here enough to entitle the infant to succeed on the ground that a trust was created in his favour.

The other decision is a recent decision of my own (2), and the real question, or one of the main questions, to be considered there, was whether an adopted child came within the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11. I held that an adopted child did not come within the word "children" as used in that section, and on that footing, and following the decision of Romer J. in *In re Engelbach's Estate* (3), I held that the infant child was not entitled to succeed.

In the present case I can see nothing which would have obliged Mr. Sinclair to keep up the policy; had he allowed the policy to lapse, by failing to pay the premium at any time, I can see no possible ground upon which the infant, or any one on behalf of the infant, would have been entitled to sue him for damages or require him to continue to keep up the policy; and indeed, had Mr. Sinclair changed his mind and surrendered the policy and received the surrender value, the money so received would have been his money, and the infant would have had no claim to it. Having regard to those circumstances, it seems to me to be impossible to say that there was any such trust as would render the money in the hands of Mr. Sinclair's executors trust money on behalf of the infant. I regret to have to come to that conclusion, because I have little doubt that had Mr. Sinclair lived till the policy matured he would have permitted the infant to have the money; but although I have no doubt Mr. Sinclair did intend by this method of taking out a policy to benefit the infant, that is not enough to justify me in saying that the executors, who must do their duty to their own estate, are under any obligation to hand over the policy moneys to the infant.

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(1) [1892] 1 Q. B. 147.
(2) [1937] 2 All E. R. 548.
(3) [1924] 2 Ch. 348.

The other way in which the argument on behalf of the infant is put is that it is a case to which s. 56 of the Law of Property Act, 1925, applies. That section provides: "A "person may take an immediate or other interest in land "or other property, or the benefit of any condition, right of "entry, covenant or agreement over or respecting land or "other property, although he may not be named as a party "to the conveyance or other instrument." It is material to notice that the word "property" is defined in the Act, s. 204, sub-s. 1 (xx.), as including "any thing in action and "any interest in real or personal property." It is quite obvious that that section, if it were read quite literally, would have an over-reaching effect which was never the intention, and could not have been the intention, of the Legislature. As has been pointed out by Luxmoore J. and Simonds J. and the Master of the Rolls in the Court of Appeal in the cases to which I have been referred, a reasonable construction must be put upon this section. It is said that in this case the infant is entitled to take advantage of the section because he is a person who takes an immediate or other interest in land or other property, although he may not be named as a party to the conveyance or other instrument. It is said here that the infant, although not one of the contracting parties, and therefore not one of the parties who could have enforced the covenant (that is to say as against the Insurance Company or as against Mr. Sinclair), nevertheless is a person who gets a benefit under the contract, because he is the person who is named in the policy as the person to whom the money is to be paid. In my judgment, whatever the section does mean, and to whatever form of contract it is to apply, it does not apply in this case. The infant is no doubt a person named in the policy as a person to whom the money may be paid, but in my judgment that alone is not sufficient to enable him to take advantage of the section and recover and retain the money as his property. Although the infant is a person who might have received the money if Mr. Sinclair had lived till the policy came to maturity and made no claim to it, or if Mr. Sinclair's executors made no claim to it, he is not a person who, as between himself and Mr. Sinclair or Mr. Sinclair's executors, is entitled to require payment of the money to him. This section cannot, in my judgment, give him a beneficial title to the policy moneys, if apart from the section he has no such title. Moreover, even if he could recover the moneys under this section, since he has no beneficial interest in them, he would hold them as trustee for the executors, who could call upon him to account to them. Under these circumstances this section does not assist the applicant, and this application fails and must be dismissed.

Summons dismissed, costs as between solicitor and client to be paid out of the policy money.

Solicitors for applicant: *Bartlett & Gregory.*
Solicitors for trustees: *Summerhays & Co.*

P. J. B.

BENNETT J.

1938

April 27, 28, 29; *June* 14.

In re MEREDITH'S TRUSTS.

MEREDITH *v.* CLARKE.

[1933. M. 3639.]

Husband and wife—Restraint against anticipation—Costs of legal proceedings—Order for payment by wife—Order made during coverture—Death of husband before payment—Costs how payable—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 *&* 26 *Geo.* 5, *c.* 30), *ss.* 1, 2, *sub-s.* 1.

An order was made on November 4, 1936, for the payment by the plaintiff (a married woman) of the costs of a motion in an action.

The order directed that " such costs are not to be payable " out of any property of hers to the enjoyment of which there " is attached any enforceable restraint against anticipation."

Under the plaintiff's marriage settlement (dated October 3, 1892) it was declared that the trustees should stand possessed of the trust fund upon trust to pay the annual income thereof to the wife during her life for her separate use without power of anticipation.

Shortly after the making of the order and before payment of the above-mentioned costs the plaintiff's husband died:—

Held, that the fact that the plaintiff was under coverture at the date of the order did not, in the events which had happened, prevent the trust fund from being applied in satisfaction of the costs of the motion; and that, in view of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, and the repeal thereby of ss. 1–5 of the Married Women's Property Act, 1882, and s. 1 of the Married Women's Property Act, 1893, and the plaintiff having ceased to be under coverture, the trust fund was not subject to an enforceable restraint against anticipation and could be so applied.

SUMMONSES.

Under a marriage settlement, dated October 3, 1892, it was declared that the trustees should stand possessed of the trust fund upon trust to pay the annual income thereof to the wife (the plaintiff in the present proceedings) during her life for her separate use without power of anticipation.

On November 4, 1936, an order was made by Farwell J., of which the material part is as follows: " And it is ordered "that the plaintiff do pay to the defendants their costs of "this motion to be taxed by the taxing master the costs of "the defendant Walter Fuller Clarke to be taxed as between "solicitor and client and the remaining defendants as between "party and party but such costs are not to be payable out "of any property of hers to the enjoyment of which there "is attached any enforceable restraint against anticipation."

The plaintiff's husband died on February 1, 1937, and the plaintiff had not remarried.

Two summonses were taken out by three of the defendants for the appointment of a receiver by way of equitable execution to receive the income and other moneys receivable in respect of the plaintiff's interest in the investments and funds for the time being subject to the trusts of the settlement for taxed costs ordered to be paid by the plaintiff to the respective applicants under the said order of Farwell J.

H. O. Danckwerts for the applicant in one of the summonses. No restraint attaches to the property at the present time. When a woman is not married, the restriction does not attach. As regards this settlement, which was made before 1936, there is a restraint on anticipation which is operative only during coverture.

On turning to the order it will be found that there is in the first place an order to pay costs. Then there is purely a question of execution. If at the moment of execution there is not attached an enforceable restraint, there is nothing in the form of this order to prevent the execution from issuing.

The position is governed by s. 1 and s. 2, sub-s. 1, of the Law Reform (Married Women and Tortfeasors) Act, 1935. (1) He referred to the Annual Practice (1938), p. 2482.

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(1) Sect. 1: "Subject to the "provisions of this Part of this "Act, and subject, as respects "actions in tort between husband "and wife, to the provisions of "section twelve of the Married "Women's Property Act, 1882, a "married woman shall—

"(*a*) be capable of acquiring, "holding, and disposing of, any "property; and

"(*b*) be capable of rendering "herself, and being rendered, "liable in respect of any tort, "contract, debt, or obligation; "and

"(*c*) be capable of suing and "being sued, either in tort or in "contract or otherwise; and

"(*d*) be subject to the law

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E. M. Winterbotham for the applicants in the other summons. There is no decided case in which it is laid down that, when an order for costs such as this has been made against a married woman, not based on contract but on default, that order cannot be enforced against her when she becomes a widow. The new Act repeals ss. 1–5 of the Married Women's Property Act, 1882, and s. 1 of the Married Women's Property Act, 1893.

This proviso in the order cannot be read as meaning more than that the order cannot be enforced against any property which is at the moment restrained from anticipation. If that is not the meaning, the order would be in conflict with the Act.

J. Leonard Stone for the respondent plaintiff. Under s. 2 of the Married Women's Property Act, 1893, the order could have been made for the payment of the money out of the property restrained. The critical date for ascertaining what property is excepted is the date when the liability is incurred, i.e., the date of the order.

He referred to *Barnett* v. *Howard* (1); *Brown* v. *Dimbleby* (2); *Scott* v. *Morley* (3); *Pelton Brothers* v. *Harrison* (4); and to the Annual Practice (1938), pp. 1697, 2296.

The effect of the proviso in s. 2, sub-s. 1, of the Act of

"relating to bankruptcy and "to the enforcement of judg-"ments and orders,
"in all respects as if she were a "feme sole."

Sect. 2, sub-s. 1: "Subject to "the provisions of this Part of "this Act all property which—

"(*a*) immediately before the "passing of this Act was the "separate property of a married "woman or held for her separate "use in equity; or

"(*b*) belongs at the time of "her marriage to a woman "married after the passing of "this Act; or

"(*c*) after the passing of this "Act is acquired by or devolves "upon a married woman,
"shall belong to her in all respects "as if she were a feme sole and "may be disposed of accordingly:

"Provided that nothing in this "sub-section shall interfere with "or render inoperative any re-"striction upon anticipation or "alienation attached to the enjoy-"ment of any property by virtue "of any provision attaching such "a restriction, contained in any "Act passed before the passing of "this Act, or in any instrument "executed before the first day of "January nineteen hundred and "thirty-six."

(1) [1900] 2 Q. B. 784.
(2) [1904] 1 K. B. 28.
(3) (1887) 20 Q. B. D. 120, 132.
(4) [1891] 2 Q. B. 422.

1935, is to preserve the status of married women who are restrained before this Act came into operation. Sect. 2 is a sort of definition clause of s. 1. Sect. 2 makes an exception.

He referred to *Pike* v. *Fitzgibbon.* (1)

The accident of the subsequent death of the plaintiff's husband cannot affect the matter. The position is unchanged as to her property on which there is a restraint. That property cannot be taken, and the position is the same as if this Act had not been passed.

Danckwerts in reply.

Winterbotham in reply.

Cur. adv. vult.

1938. June 14. BENNETT J. In this action there are before me two summonses, one issued on December 17, 1937, and the other on January 5, 1938.

Each summons asks for the appointment of the same named person as receiver by way of equitable execution to receive the income and other moneys receivable in respect of the plaintiff's interest in the investments and funds for the time being subject to the trusts of a settlement dated October 3, 1892, and made between William Maxse Meredith of the first part, the plaintiff (then Margaret Elliot) of the second part, and two gentlemen as trustees of the third part, in or towards satisfaction of certain sums due to the applicants respectively for taxed costs ordered to be paid by the plaintiff to the applicants by an order of Farwell J., made on November 4, 1936.

The settlement was a settlement made in anticipation of a marriage, shortly afterwards solemnized between the plaintiff and the said William Maxse Meredith, of property belonging at the date of the settlement to the plaintiff.

The material provision of the settlement is that it was thereby declared that the trustees should stand possessed of the trust fund upon trust to pay the annual income thereof to the plaintiff during her life for her separate use without power of anticipation.

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(1) (1881) 17 Ch. D. 454, 461,

On November 4, 1936—the date of Farwell J.'s order—the plaintiff's husband, the said William Maxse Meredith, was living. [His Lordship read the relevant part of the order and continued :] The costs which the plaintiff was ordered to pay to the applicants have been taxed. Those payable to the applicant in one of the summonses have been certified at the sum of 51*l.* 3*s.* 2*d.* Those payable to the applicants in the other summons have been certified at the sum of 29*l.* 9*s.* These sums have not been paid.

The plaintiff's husband, the said William Maxse Meredith, died on February 1, 1937. The plaintiff has not remarried. It has been proved that the plaintiff has no property which can be taken by ordinary process of execution and that she lives in furnished apartments.

In this state of facts the applicants submit that they are entitled to the orders for which they respectively ask in view of the changes in the law relating to married women effected by the provisions of Part I. of the Law Reform (Married Women and Tortfeasors) Act, 1935. Part I. of the Act came into force on August 2, 1935. It repeals ss. 1–5 of the Married Women's Property Act, 1882, and s. 1 of the Married Women's Property Act, 1893.

The relevant provisions are to be found in s. 1 and s. 2, sub-s. 1, of the Act and these provisions are as follows : [His Lordship read the provisions and continued :] In my judgment it is plain upon the wording of these provisions, the plaintiff not being under coverture and ss. 1–5 of the Married Women's Property Act, 1882, and s. 1 of the Married Women's Property Act, 1893, having been repealed, that the applicants are entitled to the relief they respectively claim, unless the language of the order of November 4, 1936, bars their rights.

The first section of the Act is an enabling one regulating the personal capacity of the married woman and thereunder the married woman can amongst other things render herself liable in respect of any obligation and be subject to the law relating to the enforcement of judgments and orders as if she were a feme sole.

The second section deals with her property and in particular with what before the passing of the Act was technically described as her separate property or property held for her separate use in equity and provides that such property is to belong to her in all respects as if she were a feme sole.

The proviso to the first sub-section of s. 2 is, I think, inserted to make it clear that restrictions upon anticipation or alienation attached to the enjoyment of any property by the provisions of an instrument executed before January 1, 1936, are not interfered with by the provisions of the sub-section. It may have been thought desirable to insert it because of the provisions of sub-ss. 2 and 3 of s. 2. The proviso does at any rate make it plain that restrictions against anticipation or alienation imposed before January 1, 1936, are not interfered with and does no more than that.

The argument on behalf of the plaintiff in resisting the orders asked for was based on the language of the order of November 4, 1936, and was to the effect that the words used meant that if at the date of the order the plaintiff was entitled to property to which there was then attached an enforceable restraint against anticipation the costs which the plaintiff was ordered to pay to the applicants never could be payable out of that property.

The answer to that argument is the simple one that that is not what the order says. It merely prohibits payment being made out of property to which there is attached an enforceable restraint against anticipation.

The question is whether the property which the applicants seek to have taken in execution is subject to an enforceable restraint against anticipation.

The answer to that question is "no."

It follows therefore that under the Act the applicants are entitled to the orders for which they respectively ask.

Solicitors: *Bertie F. Browne*; *Waterhouse & Co.*; *Hugh-Jones & Flinn.*

J. L. D.

C. A.

1938

June 30; *July* 1.

In re INSOLE'S SETTLED ESTATE.

[1924. I. 790.]

Settlement — Settled land — Improvements to mansion house — New detached range of buildings—Garage, workshop, engine-room, battery-room, tool shed, boiler-house, potting shed and greenhouses— " Structural additions " to existing building—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 93, *Sch. III., Part II., para.* (*v.*).

The tenant for life of a settled estate erected a range of buildings, consisting of garage, chauffeur's flat, workshop, engine-room, battery-room, tool shed, boiler-house, potting shed and green-houses, at a short distance in rear of the principal house on the estate, which he was improving for the purpose of personal occupation :—

Held, that these were " structural additions to . . . . buildings " within para. (*v.*) of Part II. of the Third Schedule to the Settled Land Act, 1925, and therefore improvements the cost of which could be defrayed out of capital money. The test was not whether the structural addition was physically attached to the principal house, but whether it formed with the principal house a whole or unit.

The test laid down by Lindley L.J. in *In re Lord Gerard's Settled Estate* [1893] 3 Ch. 252, 260 applied.

Decision of Simonds J. (ante, p. 408) reversed.

APPEAL from Simonds J. (1)

By his will dated April 30, 1898, the testator James Harvey Insole, having appointed executors and trustees thereof, who were to be trustees for all the purposes of the Settled Land Acts, devised his Luxborough estate in the county of Somerset upon limitations under which Eric Raymond Insole was the present tenant for life, with remainders over.

The testator died on January 20, 1901, and his will, together with three codicils which are not material to the present case, was duly proved in the Principal Probate Registry on June 12, 1901, by the executors therein named.

The Luxborough estate was sold some time before 1921, and in April, 1921, the trustees out of capital moneys in their hands part of the proceeds of the Luxborough estate, by direction of the tenant for life, purchased the Stoke Charity estate, in the county of Hants. This was an agricultural estate of 1729 acres, and included a house known as Old Stoke. The property was conveyed to the trustees to hold upon the trusts of the will.

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(1) Ante, p. 408.

In 1937 the tenant for life decided to take up permanent residence at Old Stoke, previously used as a shooting lodge, to alter the existing buildings and to erect new buildings in order to provide appropriate accommodation for the use of the house as a principal mansion house. The specification included various works the cost of which the trustees were satisfied could properly be allowed out of capital moneys as being for improvements within the Settled Land Act, 1925, but as to other works there was considerable doubt on the question, and the trustees took out this summons to have it determined whether the following works, namely, a range of greenhouses and a building consisting of garage, chauffeur's flat, workshop, engine-room, battery-room, tool-shed, boiler-house and potting shed, all of which were separated from the house, and at a distance of from 30 to 50 feet in rear thereof, were improvements which the trustees were authorized to pay for out of capital moneys in their hands under s. 83 and para. (v.) of Part II. of the Third Schedule to the Settled Land Act, 1925. (1) The trustees were advised by their surveyors that the works were reasonably required and would add to the letting and selling value of the land, and they were willing to allow the cost out of capital, if the Court was of opinion that they could properly do so.

Simonds J. said it was argued that the works in question could be called " structural additions." It seemed to him to be a misuse of language to say that a range of buildings erected some 30 to 50 feet from the principal house was a structural addition to the house. In his view it was impossible to regard as a structural addition what was not according to ordinary parlance substantially part of the same structure. A range of buildings of this character at such a distance from the house could not constitute a structural addition to it. The contrary argument appeared to involve that if a building was in existence and another building was erected and used in connection with it, the latter building was a structural addition to the former. If this had been intended, the Legislature would have used apter language. He could only decide that the works did not constitute authorized improvements within para. (v.) of Part II. of the Third Schedule to the Act.

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(1) Settled Land Act, 1925, Third Schedule, Part II.: " Improvements, the Costs of which "the Trustees of the Settlement or "the Court may require to be "replaced by Instalments. . . . "Para. (v.) Structural additions "to or alterations in buildings "reasonably required, whether the "buildings are intended to be let "or not, or are already let."

The tenant for life in possession appealed. The appeal was heard on June 30 and July 1, 1938.

Spens K.C. and *Horace Freeman* for the appellant.

Simonds J. has given the words "structural additions to ". . . . buildings" in the Settled Land Act, 1925, Third Schedule, Part II., para. (v.) too narrow a construction. "Structural additions" are additions of a structural nature and whether they need be annexed to the existing building or not depends on the facts of the particular case. The existence of mere physical annexation cannot be the determining factor. In the case of many an old house it is more convenient to make the additions necessary to its comfortable use apart from the house. Here the course adopted accords with general usage, namely to have the residence on one side of a yard and the necessary outbuildings on the opposite side. The principle laid down by Lindley L.J. in *In re Lord Gerard's Settled Estate* (1) applies here and shows that a detached building may be so associated by use with the main building as to make it part of the main building. Every one is agreed that the range of buildings in the present case was necessary to the use of the house as a mansion house.

[SIR WILFRID GREENE M.R. May not the test be whether the new building forms with the old building a unit, even though there is a physical gap between them ?]

Yes, and here that test is satisfied. In *In re Blagrave's*

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(1) [1893] 3 Ch. 252, 259, 260.

Settled Estates (1) Joyce J. allowed the cost of an engine-house out of capital moneys, and although the decision was commented on in the Court of Appeal, it was not under appeal on this point. The greenhouses stand on the same footing as the range of buildings to which they are attached.

Evelyn Rivière for the tenant in tail and *Gilbert Dare* for the tenant for life in remainder supported the appeal.

G. P. Slade for the trustees. It is the trustees' duty to protect possible unborn issue, but the matter is fully before the Court. The list of improvements includes, however, the cost of heating the greenhouses. That ought not to be paid out of capital moneys.

Spens K.C. agreed that no claim could be made for the cost of heating.

SIR WILFRID GREENE M.R. This is an appeal from a decision of Simonds J. (2) The appellant is tenant for life under a settlement which originally comprised an estate known as the Luxborough estate in the county of Somerset. That estate has been sold, and out of the purchase price there has been purchased another estate called the Stoke Charity estate in Hampshire, and in the house standing upon that estate the present tenant for life lives. The appeal is by the tenant for life who desires to have paid for out of capital moneys the cost of certain buildings erected or proposed to be erected close to the dwelling-house. The buildings in question consist of a new glass-house and a new range of buildings comprising garages, chauffeur's flat, with an engine-room, battery-room, boiler-house, workshop and potting shed. These buildings, as is shown upon the plan, form one continuous block, and they are situated close to the dwelling-house itself, just across a yard which lies to the rear of the dwelling-house. The whole group of buildings will form a group which is familiar in domestic architecture in this country. The other parties to the appeal are persons interested in remainder subject to the life estate of the appellant and the trustees. The remaindermen support the

(1) [1903] 1 Ch. 560.

(2) Ante, p. 408.

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application; but the trustees, as in duty bound and as representing unborn beneficiaries, have placed before the Court all proper considerations to assist the Court in coming to its conclusion. It is agreed on all sides that the buildings will form a beneficial addition to the dwelling-house, and from that point of view it is for the benefit of all interested in the settlement that they should be erected.

The particular provision of the Settled Land Act upon which the application is based is to be found in Part II. of the Third Schedule, para. (v.). That schedule sets out the "improvements, the cost of which the trustees of the "settlement, or the Court may require to be replaced "by instalments." Para. (v.) is in the following terms: "Structural additions to or alterations in buildings reason-"ably required, whether the buildings are intended to be "let or not, or are already let." It is established that these particular works are reasonably required, and the sole question that arises is whether or not they fall within the words: "Structural additions to buildings." The learned judge took the view that upon the true construction of those words the facts of the present case did not fall within them. In considering the meaning of the phrase in question it is necessary to discover what is the test which Parliament intended to lay down. I think it is clear that in order to comply with the language of the paragraph it must be possible to say, when the alleged additions have been made, that those additions and the buildings to which it is said they are additions, should have a relationship to one another which makes it possible to say that they form a whole or a unit. The first test which suggests itself is that in order to form such a whole or unit the additions must structurally touch or be attached to the buildings in question. That is a test which I find it impossible to accept; it would be placing upon the words a very narrow construction and one which would make them completely unsuitable to the ordinary circumstances which attend matters of this kind, unsuitable in view of the common method of building both domestic and other buildings in this country. To say that a garage, if built next to and touching a building so as to form a continuation or enlargement of it, would be a structural addition, but that if the garage was separated by two or three feet from the structure of the house it would not be a structural addition, appears to me to involve a construction of these words which in its consequence would be narrow and capricious. Indeed the learned judge has not, as I understand his judgment, laid down any such test. The test which he lays down is of this nature. He says that it is impossible to regard that as a structural addition which is not according to ordinary parlance a substantial part of the same structure. That, it is to be observed, is merely laying down what I may describe as a physical test. It does not require that the addition should be actually touching the buildings, but it is a physical test in this sense, that the matter to be considered and the only matter to be considered, is the physical nearness of the addition to the building. That again I do not find a satisfactory test. It would lead to refinements on matters of fact and would include apparently a case where the building was a few feet or a few yards away, but might exclude a building which was across a court-yard as in the present case. That would not be in accordance with what may be described as a common architectural lay-out of groups of buildings in this country. It seems to me that when once the purely physical test of contiguity is abandoned, some other test, not merely a purely physical test, must be adopted. The question is what that test ought to be. The answer in my opinion is that the whole group of buildings, when completed, must be looked upon and considered, and regard must be had to their relationship to one another, their use and so forth. I am not suggesting for a moment that in that examination the question of physical farness or nearness is not a relevant consideration, it is a relevant consideration, but in my opinion it is not the only consideration.

In this connection, I cannot do better than refer to some expressions of Lindley L.J. in the case of *In re Lord Gerard's Settled Estate.* (1) Lindley L.J. was dealing in his judgment

(1) [1893] 3 Ch. 252.

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with the words: "The rebuilding of the principal mansion-"house," and he was considering the question whether the building of stables might or might not fall within those words. What he said was this (1): "Whether stables can "or cannot be regarded as part of the principal mansion-house "is a question of fact in each particular case. In some cases "I think they can. In some cases I am clear they cannot. "All stables cannot be regarded as part of the principal "mansion-house—that is perfectly obvious. On the other "hand, stables may be so connected with it, not merely "physically, but by occupation, enjoyment and propinquity, "as to fall within the expression 'rebuilding the principal "'mansion-house.' In this particular case it may be that the "old stables were so used for the purposes of the mansion-"house and were so near to it that they could be fairly "regarded as part of the principal mansion-house." That appears to me to lay down a test which is not merely consistent with the language used by Parliament but will give to that language a reasonable effect and one which is consistent with the ordinary practice of this country in relation to domestic architecture and groups of buildings generally. It is true Lindley L.J. here does not deal with the particular words which are in question in this case; nevertheless it seems to me that the considerations which he regarded in dealing with those words before him are considerations which apply equally to those with which we are dealing. The learned judge placed reliance upon a decision of this Court in the case of *In re Blagrave's Settled Estates.* (2) That was a case where the relevant section was the Settled Land Act, 1890, s. 13, para. ii.: "making any additions to or alterations "in buildings reasonably necessary or proper to enable the "same to be let." Apart from the word "structural" which we have in the paragraph with which we are concerned, the language there is similar to the language in the present paragraph. The word "structural" was no doubt used in order to exclude such matters as machinery and heating apparatus, and so forth. In the case of *In re Blagrave's*

(1) [1893] 3 Ch. 260.

(2) [1903] 1 Ch. 560.

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Settled Estates (1) there was an engine-house and an accumulator room erected at some distance from the dwelling-house. The exact distance does not appear in the report, but from the expressions used I should infer that it was a considerable distance away. However that may be, it was certainly not physically attached to the dwelling-house, and notwithstanding that fact Joyce J. allowed the necessary sum to be paid out of capital moneys for the cost of that building. The question that came before this Court related to the engine and accessories. Joyce J. had disallowed those and in this Court it was attempted to upset his decision. That attempt failed, but in the course of the judgment of Romer L.J., the Lord Justice said this (2): "I am bound to say that I do not quite see how "the learned judge in the Court below came to allow the "expense of the erection of the dynamo-house, seeing, as far "as I am aware, that that house was some distance from the "mansion-house. It is difficult to see at first sight how it "could be said to be an addition to, or alteration in, the "mansion-house, or any previously existing buildings; but "that point is, fortunately, not before us." It is to be observed that that particular matter was not before the Court, as Romer L.J. points out, nor was it argued, and the present position so far as the decision is concerned is that Joyce J.'s decision stands, and the observations of Romer L.J. are by way of dictum only.

I find myself unable to extract any real guidance from those observations in view of the fact that the actual facts of that case in relation to that particular matter do not appear in the report. As I have said I should have inferred from the language used that there was a physical distance which was of such a nature as to impress the mind of the learned Lord Justice. However that may be, I cannot as I say find guidance in those words, and I prefer myself to take the language of Lindley L.J. which I have quoted already as a guide in this case. In the result I think the construction of the paragraph which I have adopted is one which gives a practical working efficacy to the paragraph; it does not involve drawing any

(1) [1903] 1 Ch. 560.

(2) Ibid. 564.

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illogical or unreasonable distinctions in deciding whether a building is or is not an addition. It lays down a logical and sensible principle which will work in practice. One naturally differs with regret from the opinion of Simonds J. in such a matter as this, but I cannot help taking the view that in his construction of the paragraph he has given it too narrow a meaning, and in my opinion the appeal must be allowed.

SCOTT L.J. I agree.

CLAUSON L.J. I agree.

Appeal allowed.

Solicitors: *Collyer-Bristow & Co.; Henry S. L. Polak & Co.*

H. C. G.

In re LENG (DECEASED).
DODSWORTH *v.* LENG.

SIMONDS J.
1938
June 1.

[1938. L. 229.]

Will—Legacy in trust for infant for life contingently on attaining twenty-one—Accumulation of surplus income—Maintenance and education out of income—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 31.

Under a will the trustees were directed to hold the testator's residuary trust fund, subject to the payment of an annuity, upon trust for his children who should attain the age of twenty-one years. The trustees were to retain the shares, and between the ages of twenty-one and twenty-five pay the income to the children or apply the same for their benefit, and accumulate the balance (if any) thereof, and after the age of twenty-five to pay the accumulations and the income to the children during their lives, and to hold the capital, including accumulations made during minority, for the children of each child who should attain twenty-one years, with gifts over to the other children of the shares of any dying without issue :—

Held, that the trustees had power under s. 31 of the Trustee Act, 1925, to apply intermediate income in the maintenance and education of the testator's infant children.

Sect. 31 of the Trustee Act, 1925, has in this respect made no alteration in the law contained in s. 43 of the Conveyancing Act, 1881, and the decisions thereunder.

In re Reade-Revell [1930] 1 Ch. 52 distinguished on the ground that in that case a specific direction to accumulate amounted to a contrary intention within s. 69, sub-s. 2, of the Act.

SUMMONS.

The testator, Douglas Christopher Leng, by his will dated January 30, 1931, appointed Lumley Leonard Savage Dodsworth, Archibald John Boyd, and Douglas Stephenson Branson to be executors and trustees thereof, and after bequeathing certain specific and pecuniary legacies devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees upon trust for sale, conversion and investment, and to stand possessed of the residue upon trust in the first place to pay to the male guardians of any son or sons of his so much of the income as might be necessary to maintain him or them at one of the great public schools and afterwards at a university for such period as they should think fit, and subject thereto upon trust to pay an annuity of 1000*l.* to his wife during her life so long as she should remain his widow, she maintaining, educating, and bringing up in a manner suitable to their station in life such of his sons as should for the time being be under the age of twenty-one years, and such of his daughters as should be under that age and unmarried. And if his wife should remarry upon trust to pay her an annuity of 200*l.* during the remainder of her life, and in the event of such remarriage, subject to the said annuity, the testator directed that his trustees should stand possessed of the trust fund in trust for all his children who should attain twenty-one years in equal shares.

By clause 9 of the will the testator declared that the shares of each child in the trust fund should not vest absolutely, but should be retained by his trustees (1.) upon trust until each child attained the age of twenty-five years to pay the income to each child or to apply the same for his or her benefit and to accumulate the balance if any of the said income ; (2.) thereafter to pay the said accumulations and the future income thereof to such child during his or her life; and (3.) from and after the death of such child upon trust for the children of such child who should attain the age of twenty-one years in equal shares, with a gift over to his other children subject to the like trusts of the share of any child who should die without leaving children to attain that age. In default of issue to survive him who should attain a vested interest the testator directed his trustees to stand possessed of the trust fund upon trust, subject to the interest therein of his wife, for the persons who should at the date of the failure of the preceding trusts be his next of kin.

By clause 13 of his will the testator empowered his trustees in their absolute discretion, and notwithstanding any of the trusts thereinbefore declared, to apply any part or parts not exceeding in the whole one moiety of the expectant, presumptive, or vested share of any child or grandchild in or towards the advancement in life or benefit of the same child or grandchild, whether under the age of twenty-one years or not, or to pay the same moiety or any part thereof to such child or grandchild if he or she should have attained the age of twenty-five years.

The testator died on June 3, 1933, and his will was duly proved by the executors therein named on August 2, 1933.

At the date of the summons the value of the testator's residuary estate, excluding accumulations, subject to the trusts of his will was approximately 100,000*l.*, and the income of the estate, including the accumulations, after deduction of income tax therefrom was some 2800*l.* a year.

The testator was married once only, namely to the defendant Marcia Mary Leng, and there were two children of the marriage only—namely, the defendants Christopher Antony William Leng, born in 1922, and David Joseph Timothy Leng, born in 1924. The testator's widow had not remarried. The elder son Christopher was at a public school, the younger son David at a preparatory school. The trustees at the date of the summons were not applying any part of the income of the estate towards the educational expenses of David Leng, as they were advised they had no power to do so until he went to a public school.

Since the testator's death the whole of the surplus income of his residuary estate had been accumulated, and such accumulations amounted approximately to 13,000*l.*

The summons was taken out to have determined several questions arising in the administration of the estate, and in particular whether upon the true construction of the testator's will,

1. (*a*) The balance of the income of his residuary trust fund during the life of the defendant Marcia Mary Leng or until her remarriage after providing for any payments for the education of the infant defendants at a public school or university and the said annuity of 1000*l.* payable to the defendant Marcia Mary Leng is applicable as income of the trust fund under the trusts declared in clauses 8 to 13 (inclusive) of the will and expressed to take effect after the death or remarriage of the defendant Marcia Mary Leng or some and which of such trusts or whether the same is wholly or to some

and what extent undisposed of by the said will and devolves as on the intestacy of the testator.

(*b*) Whether in the event of the defendant Marcia Mary Leng remarrying the balance of such income during the remainder of the life of the said defendants after providing for the said payments and the reduced annuity of 200*l.* payable to the said defendant during her life would be applicable as income of the trust fund under the trusts aforesaid or some and which of such trusts or whether the same is wholly or to some and what extent undisposed of by the said will and devolves as on the intestacy of the said testator.

2. In the event of such balance of income being held upon the trusts aforesaid—

(*a*) Whether the contingent share of such income of each of the infant defendants during his minority ought to be accumulated as an addition to the capital of such contingent share or how such income and any accumulations thereof ought to be applied, and

(*b*) Whether such income is applicable under s. 31 of the above mentioned Act or otherwise towards the maintenance and education of the said infants or not and if such income is so applicable whether upon the true construction of the said will and during the present widowhood of the defendant Marcia Mary Leng the plaintiffs as such trustees as aforesaid can properly apply the same for such purpose under the said section of the said Act or otherwise notwithstanding the fact that the said annuity of 1000*l.* payable to the defendant Marcia Mary Leng is charged with the maintenance and education of the said infant defendants.

Wilfrid Hunt for the plaintiffs, the executors and trustees of the will. The unapplied accumulations under clause 9 of the will must go and be treated as an accretion to the corpus: *In re Reade-Revell.* (1) Sect. 31 applies in the case of a contingent interest only if the gift is one carrying the intermediate income. A similar question, as it arose under the Conveyancing Act, 1881, came before Younger J. in *In re Boulter.* (2) Until 1925 there could be no doubt that the children would be entitled to be maintained out of the income. Having regard to the very wide powers of advancement the trustees could maintain the infant defendants out of capital, if necessary.

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(1) [1930] 1 Ch. 52. (2) [1918] 2 Ch. 40.

T. A. C. Burgess for the infant defendants. The note to s. 31 in Wolstenholme & Cherry's Conveyancing Statutes, 12th ed., at p. 1317, says that sub-s. 3, save for the words in brackets, which are new, is mainly declaratory of the existing law. The trust is not a trust to arise in the future, but is in existence now, and therefore there is power to apply the intermediate income in maintenance. The decision in *In re Reade-Revell* (1) is distinguishable, as there in effect Clauson J. held that there was a contrary intention shown within s. 69, sub-s. 2, of the Act. He held that an express direction to accumulate the income amounted to a contrary intention. In *In re Reade-Revell* (1) the trust did not come into effect at all until the child attained twenty-one.

R. O. Wilberforce for the defendant Mrs. Mary Boyd. There is nothing in s. 31 to prevent maintenance out of income being given to a child who is entitled contingently on attaining the age of twenty-one. Clauson J. in *In re Reade-Revell* (1) said that in his opinion the bequest did not carry intermediate income, because there was a trust to accumulate. That is too narrow a construction of the word "carry."

Hon. Denys B. Buckley for the testator's widow, Mrs. Marcia Mary Leng.

SIMONDS J. [after deciding that upon the true construction of the will there was an immediate gift in the first place to the children of the testator subject only to the interest of the widow and to the provisions for the education of the children, continued :] In this case, as I have already held, upon the true construction of this will the residuary trust fund established thereby is held in trust for the testator's children who attain the age of twenty-one years in equal shares, and those shares are by subsequent provisions of the will settled upon them so that each child of the testator attaining

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(1) [1930] 1 Ch. 52.

ing twenty-one will take a life interest only in his share. The children of the testator are not yet twenty-one years of age; there are two infants; and the result of that is that, according to the well-established principle, the intermediate income until the children attain twenty-one is added to the corpus of the trust fund; so that each child will take a life interest in a fund which will be increased by the addition of the intermediate income; and the question is whether under the law as it now stands the children are maintainable out of that intermediate income.

Under the law as it stood before the Act of 1925 there is, I think, no doubt that they would have been so maintainable; the question is whether s. 31 of the Trustee Act, 1925, has so altered the law that they are not maintainable. Even without the assistance of the decisions upon the corresponding section of the Conveyancing Act, 1881 (s. 43), I should have had no difficulty in concluding that this is a case to which the statutory power of maintenance conferred by s. 31 of the Trustee Act, 1925, applies. It appears to me to fall clearly within the language of sub-ss. 1 and 3. A consideration of the earlier decisions confirms that view. I see no reason to doubt that, as stated in Wolstenholme & Cherry's Conveyancing Statutes, sub-s. 3 is mainly declaratory of the law. I should certainly hesitate long before concluding that an alteration was intended which would have the result described by Younger J. in *In re Boulter* (1) as " monstrous."

I have, however, had pressed upon me the case decided by Clauson J. of *In re Reade-Revell.* (2) In that case the learned judge had to consider a case where there was a legacy of 40,000*l.* given by the testatrix upon trust to pay the income to her husband during his life, and, after his death, until the beneficiary should attain the age of twenty-one years to accumulate the income, to add the income so accumulated to capital and to pay the income of that capital fund to the beneficiary for her life. Having, as I say, that disposition to consider, he held that it was not possible to maintain the beneficiary out of the intermediate income until she attained

(1) [1918] 2 Ch. 40, 42.

(2) [1930] 1 Ch. 52.

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the age of twenty-one years. But the learned judge came to that conclusion by reason of the fact that in that will there was a specific direction to accumulate, and he held that, having regard to that direction, it was impossible that the child should be maintained during her infancy. He did not, as I understand it, intend to decide that the old law then well established in regard to the maintenance of infants out of intermediate income where those infants would upon attaining the age of twenty-one years be entitled to the income of the trust fund was abrogated. I think he decided that case upon the particular language of the instrument which he had to construe, and I do not feel that it is an authority which binds me to hold that in the present case the infants are not maintainable out of the intermediate income which will otherwise go to increase the capital of the shares to which they will upon attaining twenty-one become entitled.

Accordingly I shall declare in this case that the intermediate income is available for the maintenance of the infants.

Solicitors: *Montagu's & Cox & Cardale, for Branson & Son, Sheffield.*

H. L. L.

SIMONDS
J.

1938

May 27, 31;
June 23.

In re RHAGG (DECEASED).

EASTEN *v.* BOYD.

[1937. R. 1073.]

Will—Construction—Bequest by solicitor of his business to managing clerk—Clerk taken into partnership—Ademption—Property comprised in bequest.

A testator by his will bequeathed his business of a solicitor and the office furniture, law books, and other articles in the office to his managing clerk, and bequeathed the residue of his estate to charities. Some time after the date of the will the testator made the legatee his partner, giving him one-half of the profits. On a summons taken out to determine the question what passed under the bequest:—

Held, (1.) that the bequest was not adeemed by the partnership agreement; (2.) that all the assets and moneys employed in the business, including the office premises, undrawn profits, the testator's capital therein, and loans made to clients or prospective clients, and not merely the goodwill of the business, passed to the legatee.

In re Barfield. Goodman v. *Child* (1901) 84 L. T. 28 approved.

SUMMONS.

The summons was taken out by the executor of the will, dated December 29, 1934, of Adamson Rhagg, solicitor, of Newcastle-upon-Tyne, to determine questions of construction arising thereunder.

By his will the testator, after giving a legacy to his housekeeper, bequeathed his business as a solicitor and the office furniture, law books, and other articles in his office to his managing clerk, the defendant John Henry Boyd, and bequeathed all his residue to three named charities at Newcastle-upon-Tyne. The value of the testator's estate was about 24,000*l.*

On April 1, 1935, the testator admitted the defendant Boyd to partnership in his business, giving him one half-share of the profits, but no partnership deed was executed.

The testator died in 1937 at the age of eighty years, and left no dependants.

The principal questions raised by the summons were whether the bequest of the business was to any and what extent adeemed by the partnership agreed on; and, secondly, if the bequest took effect, what was included in it. In particular, were any of the following items, and which, included—namely, (1.) the goodwill and the benefit of the name; (2.) debts due or to become due for costs and disbursements for work done or in progress at the date of the testator's death; (3.) moneys at the bank; (4.) any mortgages or loans; (5.) premises occupied; (6.) undrawn profits or share of profits; (7.) the testator's capital invested in the business. A further question was whether the defendant Boyd had to take over and indemnify the testator's estate against all or any and which of the debts and liabilities of the business.

Wilfrid M. Hunt for the plaintiff, an executor of the will.

H. E. Salt for the defendant Boyd. The bequest of "my "business as a solicitor" carries with it all the assets of the business, subject to its liabilities. The gift is not confined to one of goodwill and the use of the testator's name, for in a solicitor's business goodwill is practically non-existent. The surrounding circumstances must be considered to interpret the gift. The testator was a man over eighty years of age with no dependants. He drew up a balance-sheet, though he need not have done so, which separated all the assets employed in his business as a solicitor from his other property. The only case at all near the present is that of *In re Barfield.* (1) See also, however, *Arundell* v. *Bell.* (2)

C. D. Myles for a legatee.

J. Neville Gray K.C. for the residuary legatees. The gift should be confined to the goodwill of the business and the other assets specifically mentioned, the furniture, law books, and other articles in the office. The "business" is the goodwill: see *Blake* v. *Shaw* (3); *Hill* v. *Fearis.* (4) In *Delany* v. *Delany* (5), where the gift was of "my said business and the

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(1) 84 L. T. 28.
(2) (1883) 52 L. J. (Ch.) 537.
(3) (1860) John. 732.
(4) [1905] 1 Ch. 466.
(5) (1885) 15 L. R. Ir. 55.

"goodwill thereof," it was held that the capital of the testator employed therein did not pass under the gift.

See *In re Stephens* (1); *In re Deller's Estate.* (2) To give "my business" simply means the right to carry on the business. The special mention of the law books, office furniture and other articles has the effect of narrowing the meaning of the word "business." At least, moneys in the bank, loans made on mortgages, and undrawn profits would not pass.

[SIMONDS J. It might ruin the business if all the loans made by the testator to clients were to be called in.]

The loans are not so necessary for carrying on the business as the office furniture. A specific legacy does not carry profits being earned down to the date of the testator's death. The context reduces the word "business" to the right to conclude unfinished work. But I admit that the office books must go with the business. The present will is quite different to that which came before Farwell J. in *In re Barfield.* (3)

H. E. Salt in reply. The loans included in the testator's balance-sheet are his business loans and pass with the business. The testator made other loans which he did not enter in his balance-sheet. The testator went to the trouble of earmarking his business as distinguished from his private assets, and all business assets pass under the bequest of the business. The law books and office furniture are specifically mentioned, because they were not included in the balance-sheet, and therefore their mention does not cut down the wider meaning of the word "business." The words "all my share and "interest" in *In re Barfield* (3) define the quantum of the estate, but do not affect the scope of the parcels. [He also referred to *Rogers* v. *Rogers.* (4)]

Cur. adv. vult.

1938. June 23. SIMONDS J. The testator, Adamson Rhagg, carried on business as a solicitor at Newcastle-upon-Tyne. From the year 1922 he employed as a clerk the defendant, John Henry Boyd, who is a qualified solicitor. The terms of employment were that Mr. Boyd received a fixed salary and a proportion of any profit costs arising from business introduced by him. This arrangement continued until some time in the year 1935 when, as is now conceded by the plaintiff, the legal personal representative of the testator, an agreement for partnership was made between the testator and Mr. Boyd. That agreement was that the partnership between them should be deemed to have begun on April 1, 1935, that as from that date Boyd should be entitled to one-half of the net profits of the business, and that for the previous year some alteration should be made in the remuneration of Boyd. The financial year of the business had at all material times been from April 1 to March 31, and before the year ending March 31, 1935, the accounts were always made up on a cash basis, nothing being brought into account in respect of bills rendered and unpaid or for work in progress.

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(1) (1888) W. N. 110.
(2) (1888) W. N. 62.
(3) 84 L. T. 28.
(4) (1910) 11 St. Rep. N. S. Wales 38.

On December 29, 1934, that is, before any agreement for partnership had been made, the testator made his will. He appointed his friends, Farquhar Alexander Ogilvie Laing and the plaintiff, executors and trustees thereof and then made this bequest: " I bequeath my business of a solicitor and the "office furniture law books and other articles in my office "to my clerk John Henry Boyd." He appears to have had no family for whom he wished to provide, and devised and bequeathed the residue of his estate on trust for sale and for the payment out of the proceeds of sale of substantial legacies to his housekeeper and friends or relatives and, subject thereto, on trust for three named charities in equal shares.

The question for my decision is what is the effect of the bequest to the defendant Boyd which I have stated above in full.

It was conceded by counsel for the residuary legatees that the altered circumstances did not cause an ademption of the bequest and that some effect must be given to it notwithstanding that the testator had not at his death, as he had at the date of his will, the business of a solicitor to dispose of but only his share or interest in such a business. On the basis of this concession I must read the bequest as a bequest by the testator of his share or interest of and in the business of solicitors carried on by him in partnership with the defendant Boyd.

On behalf of the residuary legatees it has been contended that the bequest of the business—or, as I must now read it, a share of the business—comprises nothing more than the testator's share of the goodwill, neither his capital, nor undrawn profits, nor interest in unpaid bills or in work in progress, nor the leasehold premises at which the business was carried on, being included.

On behalf of the defendant Boyd it has been contended that all the items which I have enumerated are included in addition to goodwill. Further questions have arisen of what was the testator's capital in the business if it was included in the bequest.

The meaning of the word "business" in a bequest will, no doubt, depend to a large extent on its context and the surrounding circumstances, but it seems to me desirable to see whether I can obtain any guidance from cases in which the question has been considered.

In *Blake* v. *Shaw* (1), where the testator, a wholesale clothier, gave "the plant and goodwill of my business in "Aldersgate Street," Page Wood V.-C. held that neither stock-in-trade nor furniture in the house passed under the gift of plant, but held that the house, which had no intrinsic value apart from the goodwill, did pass under the gift. The Vice-Chancellor thought that the testator in that case in making a gift of plant and goodwill did not mean them to be severed from the place where the business was carried on and that the gift in which, as he said, each word aided the other might properly be taken to pass the leasehold, which the testator must have known to have no value except as an adjunct to the business.

With this case may be contrasted *In re Henton* (2), where, the testator having directed his trustees to carry on his business until his son should attain the age of twenty-one years and then to pay the debts of the business and assign it to his son, Fry J. held that the freehold shop where the business was carried on did not pass, basing his decision, according to the report, largely on what he described as the first rule of law—namely, that the heir cannot be disinherited except by direct words, and adding that the case of *Blake* v. *Shaw* (1) went to show that it was a question purely of intention.

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(1) John. 732.

(2) (1882) 30 W. R. 702.

In *Delany* v. *Delany* (2) the testator, a corn and wool factor, directed his executors to assign and transfer to H. " my said "business and the goodwill thereof, with the premises in which "the same shall be carried on." The question was whether the word " business " included the stock-in-trade and capital employed in the business and the sacks, horses, and drays which were used for the purposes of the business. Chatterton V.-C. held that the capital employed in the business did not pass, and, with more doubt, that the stock-in-trade did not pass, but held that the sacks, horses, and drays did pass since they were used solely for the purpose of the business and " forming, as it were, part of the implements of trade, "may be said to pass as part of the business." I must admit to great difficulty in seeing what is the distinction between stock-in-trade and implements of trade for this purpose, or why if one passes as part of the business the other does not.

In *In re Beard* (3) the testator, a partner in a firm of brewers, maltsters, and corn dealers, gave all his personal estate, not being partnership assets, to his wife, and dealt otherwise with all his share, right, and interest of and in the goodwill of the businesses carried on by him in partnership, and also all his right, share, and interest of and in a certain brewery and premises and all public-houses and other real estate forming part of the partnership property, and also all debts, chattels, money, and personal estate forming part of the assets thereof. The testator had a loan account with the partnership and there was a large sum due to him at his

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(1) John. 732.

(2) 15 L. R. Ir. 55.

(3) (1888) 58 L. T. 629; 57 L. J. (Ch.) 887.

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death on this account. The question was whether this debt did or did not form part of the partnership assets, and it was held by North J. that it did not.

In *In re Deller's Estate* (1) there was a bequest of all the testator's estate and interest in the leasehold premises where he carried on business and " the business of —— now carried on by me at "—— and all the goodwill, stock-in-trade fixtures and effects "which at the time of my decease shall be employed by me "therein charged nevertheless with and subject to the payment "of my trade debts due and owing to me in connection with "my said business." It was held, according to the report, that book debts to the amount of 1600*l.* owing to the testator at his death did not pass under the bequest. No reasons appear in the report, and I can only suppose that the book debts were excluded by reason of the express inclusion of other items.

In *In re Barfield* (2) the testator, who carried on the business of a solicitor in partnership with the defendant Child, by his will gave to the defendant for his own absolute use and benefit "all my share and interest in the business of solicitors carried "on by me and him as co-partners by virtue of the deed of "partnership conditional on his acting as solicitor to my "estate free of charge except moneys taken by him from my "said estate." The substantial question appears to have been whether the testator's share of the goodwill only passed under this bequest or whether it included also the sum of 100*l.* which stood to the testator's credit in the account of the firm and a considerable sum due to him for undrawn profits. Farwell J. decided in favour of the latter contention. He could see no third course between, on the one hand, saying that practically nothing passed under the bequest, and, on the other hand, that both the share of capital and undrawn profits did pass. In this view he was no doubt largely influenced by the consideration that in such a business the goodwill was practically non-existent. He said (3) : " I find it impossible to come to the "conclusion that he intended to pass nothing at all except "the shadowy right to goodwill." The learned judge had to consider and give effect to words which are not to be found in the will which I have to consider. But, whatever differences there may be, his decision is a valuable authority to show what may pass under such a gift.

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(1) (1888) W. N. 62.
(2) 84 L. T. 28.
(3) 84 L. T. 29.

In *In re Hawkins* (1) a testator bequeathed his business and plant in Dyott Street, New Oxford Street, to his brother and his manager in equal parts, and his will proceeded: "I "will that they shall pay to Miss Annette Argent the sum of "10*l.* per week during her life." The question was whether there were comprised in this bequest (*a*) the lease of the business premises; (*b*) book debts owing to the testator at his death; and (*c*) a balance to the credit of the testator's account at his bank at his death (presumably, though it is not so stated, in connection with his business). Astbury J. held that all these items passed under the bequest. It would seem that he was influenced in coming to this decision by the fact that the legatees had to pay a weekly sum out of the assets bequeathed to them.

I have now reviewed all the decided cases which can throw any light on the question before me. They leave me, I think, free to form my own judgment on the words of this will.

I must in the first place reject the contention of the residuary legatees that nothing more than the testator's share of goodwill passed under the bequest. It appears to me an arbitrary and unjustifiable selection of a particular asset among the several assets of which a business is made up. The word "business" in such a context as this bears much the same meaning as when it is said that a man has sold his business. It means the undertaking or enterprise itself, not the process of carrying it on. When, therefore, a solicitor bequeathes his business, or as the bequest must in the present case be read, his share of the business carried on by him in partnership with another, I see no reason for saying that goodwill rather than any other asset passes. If anything passes which is an asset of the business, why should not everything pass which is an asset of the business? And equally if a share in one asset passes, why not a share in all?

(1) (1913) 109 L. T. 969.

There will, no doubt, often be room for controversy what are the assets of the business, whether it be an individual business or a partnership business. But, if an asset can properly be called an asset of the business, I see no reason for its exclusion from the bequest, unless a particular context makes exclusion necessary.

Secondly, I must observe that somewhat different considerations may be involved where the business was that of the testator alone and where he carried it on in partnership. In the former case to speak of his "capital" in the business or his undrawn profits may be wholly misleading. The substance of the bequest is the assets of the business subject to its liabilities. There may be balancing figures in the accounts of the business which are called capital and undrawn profits, but, in fact, those figures are represented by the assets of the business, the stock-in-trade, cash at the bank, and so on. It is these items which constitute the business and which will, in my view, ordinarily pass under a bequest of the business. Where, on the other hand, the testator carries on a business in partnership, and bequeathes his share in the business, the result can only be to put the legatee in his place in relation to his partner. The legatee will, subject to the partnership articles, become co-owner of the several assets of the business, but the right and the obligation to account is of the essence of the relation, and in that connection it is sensible to speak of the capital and undrawn profits of the testator. They are things which have a real meaning as distinct from the assets of the business in the relation which exists between the partners. The distinction may be of no practical importance where the legatee is himself the sole surviving partner, but it would be vital if he were not.

In the present case, since, as the residuary legatees concede, the bequest is not adeemed by the testator having taken a partner after the date of his will, I construe it as a bequest by the testator of his share of the business carried on by him in partnership. That means that the legatee is to have all the rights of which under the partnership agreement or under the general law relating to partnership the testator is able to dispose. If the legatee and the partner were different persons, it might be said with sufficient accuracy that they would, subject to the partnership articles, become co-owners of the partnership assets with the right and obligation to account which I have mentioned. The fact that they are the same person cannot, in my judgment, affect the nature of the gift. I see no reason for excluding from it anything which was, in fact, an asset of the partnership or for treating the right and obligation to account as in some way limited or curtailed.

If the gift is confined to goodwill or a share of goodwill, as the residuary legatees contend, the result will, indeed, be a strange one. The residuary legatees will presumably be entitled to require that the other assets of the partnership should be realized in the ordinary course of winding it up; the leasehold premises on which the business has been carried on, and which might well be of importance to its successful continuance, must be disposed of; the debts due to the business must be got in, and got in without that regard for the feelings of a client which would influence a solicitor anxious to maintain the goodwill of his business. I see no justification for attributing such intention to the testator, or for giving such an arbitrary direction to his bounty.

If, then, the gift is not to be limited in the way for which the residuary legatees contend, what is included in it? I find the same difficulty which Farwell J. found in *In re Barfield* (1) in excluding anything which was, in fact, treated by the testator as an asset of his business. While he carried on business by himself alone he treated as such an asset certain sums which he had advanced to clients actual or potential. These sums were, I think, to him as much the assets of his business as plant and stock would to a manufacturer be the assets of his business. I see no reason to attribute any change on his taking Boyd into partnership. They remained assets of the partnership business, with the result that the testator is, as a matter of account between himself and his partner, to be regarded as having a sum due to him on capital account of the necessary amount. So also with " undrawn profits," including sums due or to become due in respect of work done or in progress at his death. These are items which are, in my view, inseparably connected with the business; perhaps indeed nothing would come more quickly to one's mind as being included in a man's share of a business than the undrawn profits which were payable to him. So also with money in the till or money at the bank, if it can be identified with the business.

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(1) 84 L. T. 28.

I must finally notice a contention that, whatever conclusion I might come to if the bequest were only of the business, I have here a context which compels me to take a narrower view, for the gift is accompanied by "office furniture law "books and other articles in my office," and it is said that here the maxim "expressio unius exclusio alterius" must apply. There is some force in this argument, but it is diminished by the consideration that the selection of goodwill as the item which is not to be excluded remains purely arbitrary. Why should the mention of law books, etc., make it reasonable to include goodwill but unreasonable to include undrawn profits in the preceding gift of the business? It may be that the testator thought it desirable to enumerate certain tangible assets, leaving what was intangible to be comprised in the expression "business." But this is speculation. Whatever his reason may have been, I do not find in the context sufficient reason for cutting down the meaning which I should otherwise feel bound to give to the words "my business as a "solicitor" or "my share of the business carried on in "partnership with Boyd."

Solicitors: *Gregory, Rowcliffe & Co., for Dees & Thompson, Newcastle-upon-Tyne; Adam Burn & Son, for Frank Kirby & Co., Newcastle-upon-Tyne; Stibbard, Gibson & Co., for Gibson, Pybus & Pybus, Newcastle-upon-Tyne.*

H. L. L.

HAILE SELASSIE *v.* CABLE AND WIRELESS, LIMITED.

C. A.
1938
June 24, 30.

[1937. H. 28.]

International law—Action by de jure foreign sovereign to recover sum due under contract—Sum claimed by de facto foreign sovereign—Jurisdiction of Court to hear action.

The de jure sovereign of a foreign country having brought an action to recover from an English company a sum of money due under a contract, the ambassador of the de facto sovereign of that country gave notice to the company by letter that his Government claimed to be entitled to the sum in question:—

Held, that the rights of the plaintiff could be adjudicated upon without directly or indirectly impleading a foreign sovereign, and that, accordingly, notwithstanding the claim intimated, the Court had jurisdiction to hear and determine the action.

The Parlement Belge (1880) 5 P. D. 197 and *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* [1921] 3 K. B. 532 distinguished.

Morgan v. *Larivière* (1875) L. R. 7 H. L. 423, 430, and *Compania Naviera Vascongado* v. *S.S. Cristina* [1938] A. C. 485, 506, 516, considered.

Decision of Bennett J., ante, p. 545 reversed.

Appeal from a decision of Bennett J. (1)

A contract made in 1935 between the Director General of Posts, Telegraphs and Telephones of Ethiopia of the one part acting on behalf of the plaintiff, Haile Selassie the First, Emperor of Ethiopia, and the defendants, an English company, Cable and Wireless, Ld., of the other part, related to the transmission of wireless messages between an Ethiopian State radio telegraphic station at Addis Ababa, in Ethiopia, and a radio telegraphic station of the defendants in Great Britain. The relevant provision of the contract was that the charges paid by the senders of telegraphic messages between the two stations should be apportioned in the proportion of two-thirds to the transmitting station and one-third to the receiving station.

The armies of His Majesty the King of Italy having invaded Ethiopia, the plaintiff left the country on May 1, 1936, and did not thereafter return. The radio telegraphic station at Addis Ababa was closed down on May 2, 1936. On May 9, 1936, His Majesty the King of Italy and the Italian Government by proclamation annexed the Empire of Ethiopia.

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(1) Ante, p. 545.

On January 4, 1937, the plaintiff commenced these proceedings to obtain payment of the amount due under the contract. The parties agreed that the sum payable by the defendants was 10,613*l*. 11*s*. 3*d*.

In para. 5 of their defence the defendants alleged as follows : "By letter to the defendants dated February 2, 1937, the "Italian Ambassador in London gave notice to the defendants "that the moneys claimed by the plaintiff in this action were "claimed from the defendants by the Italian Government, "and by letter to the Italian Ambassador dated February 18, "1937, the defendants made inquiry whether the Italian "Government was willing to submit the determination of the "question what party is entitled to such moneys to the "decision of the English Courts or itself to commence proceedings in this country against the defendants for the "maintenance of its said claim. The defendants received an "answer dated April 14, 1937, to their said inquiry stating that "the Italian Government claims such moneys and is not "prepared to admit in any circumstance that its rights in "making such claim are in any way in doubt."

By para. 3A of their re-amended defence the defendants pleaded that the alleged cause of action of the plaintiff had passed to and become vested in His Majesty the King of Italy and the Italian Government by reason of the annexation of the Empire of Ethiopia.

By para. 3B thereof they pleaded : "Under the Constitution "of Ethiopia, the sovereign power over the Empire of Ethiopia "and all public rights appertaining thereto were vested in "the Emperor of Ethiopia as a corporation sole or alternatively "in the natural person who is for the time being the Emperor "of Ethiopia. The claim in this action is in respect of a public "right appertaining to the sovereign power of the Empire of "Ethiopia and was by virtue of the recognition in December, "1936, by His Majesty's Government of the Government of

"Italy as the de facto Government of Ethiopia suspended or "alternatively transferred to the King of Italy as the sovereign "head of the Italian Government."

It was ascertained from the Foreign Office that (1.) His Majesty's Government still recognized the plaintiff as de jure Emperor of Ethiopia, (2.) His Majesty's Government recognized the Italian Government as the Government de facto of virtually the whole of Ethiopia; and (3.) that an Envoy Extraordinary and Minister Plenipotentiary from His Majesty the Emperor of Ethiopia was accorded recognition at the Court of St. James.

Bennett J. made an order that, the defendants having proved that a claim to the moneys had been made on behalf of His Majesty the King of Italy, all further proceedings in the action should be stayed. His Lordship refused to express any opinion on the substantial defence to the action. The plaintiff appealed.

Andrew Clark for the appellant. The Courts cannot entertain an action impleading a foreign sovereign directly or indirectly. But this exemption does not apply to actions to recover property in the hands of a third party of which the foreign sovereign has not got possession and to which he is only making a claim. It is an essential element of his immunity that the property should be actually or notionally in his possession. In this case the claim is in respect of a simple debt, and there can be no possession of a chose in action until a judgment has been obtained in respect of it. The claim put forward on behalf of the Italian Government is not one of which the Court can take notice. It was not made to the Court, but was made in an informal letter to a party to the action. Such a letter is not enough to establish a claim. It does not show that the claim is bona fide or that the person writing it has the sovereign's authority. Moreover, the rights of the Italian Government are not in jeopardy, because they cannot be affected by a judgment in an action to which it is not a party. In *The Parlement Belge* (1), on which Bennett J.

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(1) (1880) 5 P. D. 197.

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relied, the property in the vessel there in question was admittedly vested in a foreign sovereign. *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1) was also a case where a foreign sovereign was in possession of property. The question of the immunity of foreign sovereigns did not arise. In the case of *In re Russian Bank for Foreign Trade* (2) no claim was made by the Russian Government to the company's surplus assets. The Court may administer a trust fund under its control, though a foreign Government not subject to the jurisdiction and not before the Court may be interested in it: *Larivière* v. *Morgan* (3); *Morgan* v. *Larivière.* (4) In such a case as this, if a foreign Government claiming to be interested does not choose to come before the Court, it cannot prevent the matter being determined at the instance of other parties interested: *Compania Naviera Vascongado* v. *S.S. Cristina.* (5)

Wynn Parry K.C. and *H. G. Robertson* for the respondents. The only interest of the respondents in this matter is to pay the money to the right person, since there is a real danger of their having to pay it twice. This case is distinguished from every previous case in that each of two foreign sovereigns are claiming property to which none of His Majesty's subjects is making any claim, the property being in this country only through fortuitous circumstances. Once it is shown that the only persons claiming an interest in the property are two foreign sovereigns, the Courts cannot entertain the case unless both submit to the jurisdiction. In this case, though the respondents are the defendants, the actual opposing claim is by a foreign sovereign.

Cur. adv. vult.

1938. June 30. The following judgment of the Court (SIR WILFRID GREENE M.R., SCOTT and CLAUSON L.JJ.) was read by SIR WILFRID GREENE M.R.:

This is an appeal by the plaintiff in the action, His Majesty Haile Selassie the First, Emperor of Ethiopia, against an order of Bennett J. staying all further proceedings in the action. The action arises out of a contract made between the plaintiff, as the sovereign head of the Empire of Ethiopia, through his agent the Director General of Posts, Telegraphs and Telephones of Ethiopia, and the defendants for the institution and working of a radio telegraphic service between Ethiopia and Great Britain. It is admitted that the contract was made, and that the sum of 10,613*l.* 11*s.* 3*d.* is owing by the defendants in accordance with its terms. The substantial defence to the action is that by reason of the conquest of Ethiopia by the armed forces of His Majesty the King of Italy, coupled with the recognition by His Britannic Majesty's Government of the King of Italy as de facto sovereign of Ethiopia, the right to recover this sum from the defendants has become vested in the King of Italy. The defence also refers to certain correspondence which took place subsequently to the issue of the writ between the defendants and the Italian Ambassador in London in the course of which it was stated by the Ambassador that his Government claimed the money, that it saw no reason to take part in the present proceedings, and that, if those proceedings resulted in the defendants being compelled to make payment to the plaintiff, it would consider itself entirely free to claim the money in question at such time, in such manner, and in such circumstances as it might consider suitable.

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(1) [1921] 3 K. B. 532.
(2) [1933] Ch. 745, 768.
(3) (1872) L. R. 7 Ch. 550.
(4) (1875) L. R. 7 H. L. 423, 430.
(5) [1938] A. C. 485, 506, 516.

The action duly came on for trial, and after several adjournments Bennett J. on March 2, 1938, reserved his judgment, which he delivered on March 23, 1938. In his reasons for judgment the learned judge declined to express any opinion upon what we have described as the substantial defence to the action. The ground upon which he made the order to stay proceedings was, to use his own words (1), that "The right "of the plaintiff to recover judgment cannot be determined "without determining whether the claim put forward on "behalf of His Majesty the King of Italy is well founded." We were informed that no argument had been addressed to him upon this point.

(1) Ante, pp. 545, 549.

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In our opinion the decision of the learned judge cannot be supported. The action is one to which the Italian Government is not a party, nor is it a necessary party. The question which falls to be decided in the action is whether or not the defendants are liable to the plaintiff, and although the claim of the Italian Government is one which, if made by a private individual in this country, could have been dealt with in interpleader proceedings, no such proceedings are possible without the consent of that Government. But the fact that His Majesty the King of Italy cannot be brought before the Court cannot deprive the plaintiff of his right to have his claim adjudicated upon by the Courts of this country in his absence unless there be some rule of English law which precludes the Courts from entertaining the claim. In our opinion no such rule of law exists. It is unquestionably true that the Courts of this country are not competent to entertain an action which directly or indirectly impleads a foreign sovereign state. Thus, if property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign sovereign, or his agent, the Courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it. The rule applies in the case both of actions in personam and of actions in rem. But it has never been extended to cover the case where the proceedings do not involve either bringing the foreign sovereign before the Court in his own person or in that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained. Where it is either admitted or proved that property to which a claim is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply. But where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned.

But it was held by Bennett J. that where a foreign sovereign has made a claim the proceedings in effect amount to impleading that sovereign. In our opinion not only is that view incorrect in principle, but it is contrary to certain weighty expressions of judicial opinion to which we will later refer. So far as principle is concerned, the present action does not seek to bring His Majesty the King of Italy before the Court, nor does it seek to interfere with any proved or admitted proprietary or possessory right belonging to him. The fact that His Majesty the King of Italy has put forward a claim to these moneys by asserting that the chose in action consisting of a debt owed by the defendants has become vested in him does not, in our opinion, add anything. It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the Courts merely because a claim to the property, or the debt, had been put forward on behalf of a foreign sovereign. Such a claim can be adjudicated upon without impleading the foreign sovereign either directly or indirectly. The phrase "impleading indirectly" does not, in our opinion, mean adjudicating upon such a claim as is made by the Italian Government in the present case. It refers to such proceedings as Admiralty proceedings in rem where the action in form is an action against the ship.

Bennett J. relied upon *The Parlement Belge.* (1) But that was a case where the property in the vessel was admittedly vested in the Belgian Government, and the claim against it involved impleading that Government. He also relied upon the observations of Scrutton L.J. in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (2) But with all respect to the learned judge he has, in our opinion, attributed to those observations a meaning which in the context they do not bear. Scrutton L.J. was considering a case where a foreign sovereign is in possession of property, but if his words were intended to go beyond such a case, and to apply to a case where property is in the hands of a third person, and the foreign sovereign

(1) (1880) 5 P. D. 197.

(2) [1921] 3 K. B. 532, 555.

has merely made a claim to it, we respectfully dissent from the view which he expresses.

We have mentioned the existence of certain observations which appear to us to support our view, and we will briefly refer to them. In *Larivière* v. *Morgan* (1) Lord Hatherley L.C. held that a trust fund out of which the plaintiff claimed to be entitled to a payment could be administered by the Court, notwithstanding that it appeared that a foreign Government was entitled to it subject to any right that the plaintiff could establish. It is true that in that case the foreign Government in question had not put forward a claim, but even if it had done so we can find nothing in the reasoning of Lord Hatherley to suggest that he would have taken a different view. That case under the name of *Morgan* v. *Larivière* (2) went to the House of Lords, where the decision of Lord Hatherley was reversed upon the ground that the fund in question was not a trust fund at all. But Lord Cairns L.C. said: "No doubt "under such circumstances, the Court, having a trust fund under "its control, might well proceed to administer that fund even "although a foreign Government might be interested in it, "and might not be before the Court, or subject to the "jurisdiction of the Court." Scrutton L.J., in a passage in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (3), preceding that relied upon by Bennett J., referred to the opinion expressed by Lord Cairns as being an obiter dictum; but, as was pointed out by Lord Maugham (then Maugham J.) in *In re Russian Bank for Foreign Trade* (4), Lord Hatherley's view was a matter not of dictum but of decision and he himself held that the circumstance that a foreign Government is or may be interested in a trust or other like fund is no reason why the Court should decline jurisdiction. In that case again, which was concerned with the winding up of a Russian company, no claim had, in fact, been made by the Russian Government to be entitled to the surplus assets of the company. But the question as to the effect of a claim by a

(1) L. R. 7 Ch. 550.
(2) L. R. 7 H. L. 423, 430.
(3) [1921] 3 K. B. 532, 555.
(4) [1933] Ch. 745, 769.

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foreign State as distinct from a proprietary title or possession proved or admitted was discussed in the House of Lords in the case of *Compania Naviera Vascongado* v. *S.S. Cristina.* (1) In that case Lord Atkin said: "The foundation for the "application to set aside the writ and arrest of the ship is to "be found in two propositions of international law engrafted "into our domestic law which seem to me to be well-"established and to be beyond dispute. The first is that the "Courts of a country will not implead a foreign sovereign, "that is they will not by their process make him agains this "will a party to legal proceedings whether the proceedings "involve process against his person or seek to recover from "him specific property or damages. The second is that they "will not by their process whether the sovereign is a party to "the proceedings or not seize or detain property which is his "or of which he is in possession or control." For present purposes we think that this can be taken as exhaustive, and it is to be observed that in the case of property the lack of jurisdiction is said to exist where the property belongs to or is in possession or control of a foreign sovereign. In the case of a debt such as that with which we are concerned there can be no question of possession or control, and the title to it is the very thing which stands to be established or not to be established in these proceedings. In *Compania Naviera Vascongado* v. *S.S. Cristina* (1) itself the vessel was in the actual possession or under the control of the Spanish Republican Government, and the decision was based on that fact. Lord Wright said (2): "In the present case the fact of possession "was proved. It is unnecessary here to consider whether the "Court would act conclusively on a bare assertion by the "Government that the vessel is in its possession. I should "hesitate as at present advised so to hold, but the respondents "here have established the necessary facts by evidence." It is to be noticed that even in this case put by Lord Wright, possession is the relevant matter, and the problem which he poses is as to whether or not a mere assertion of possession can be challenged. The fact that he expresses the view, albeit tentatively, that such an assertion would not be sufficient, does in our opinion form ground for thinking that where no such possession has been or can be asserted no objection to the jurisdiction can arise. Lord Maugham, however, expresses a clear opinion upon the subject, and although he does so only by way of dictum, we respectfully agree with his view. He said (1): "It is clear, I think, "that the property in the goods and chattels would have to "be established if necessary in our Courts before the immunity "could be claimed. The ambassador could not be sued in "trover or detinue; but, if the property were not in his "possession, and he had to bring an action to recover it, I "am of opinion that he would have to prove in the usual "way that the goods were his property. Speaking for myself "I think the position of a foreign Government is the same. "There is, I think, neither principle nor any authority binding "this House to support the view that the mere claim by a "Government or an ambassador or by one of his servants, "would be sufficient to bar the jurisdiction of the Court, "except in such cases as ships of war or other notoriously "public vessels, or other public property belonging to the "state. Professor Dicey has been relied on in favour of another "view; but his proposition, founded on existing authorities, "was that 'an action or proceeding against the property' "of a foreign sovereign or an ambassador or his suite was "for the purpose of the general rule 'an action or proceeding "'against such person' (Dicey on Conflict of Laws, "Chapter IV., Rule 52). He did not (as he showed in the "notes to the rule) mean by this that an action against "property *claimed* by such a person is beyond the jurisdiction "of our Courts. An independent sovereign sued for breach of "promise of marriage in our Courts can indeed claim to be outside "of our jurisdiction, but there is no authority for the view that, "if he wrongfully obtained possession of valuable jewellery "in this country, and it was in the hands of a third person, "he could claim to stay proceedings by the rightful owner "against that person to recover possession of the jewellery

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(1) [1938] A. C. 485, 490.

(2) Ibid. 485, 506.

(1) [1938] A. C. 485, 516.

"merely by stating that he claimed it. To come within "Professor Dicey's rule he would, in my opinion, be bound to "prove his title."

In the result the appeal must be allowed, with costs, and the action remitted to the Chancery Division for hearing.

Solicitors: *Wordsworth, Marr Johnson & Shaw*; *Bircham & Co.*

F. H. C.

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COLERIDGE-TAYLOR AND OTHERS *v.* NOVELLO AND COMPANY, LIMITED.

[1937. C. 2842.]

Copyright—Assignment—" Passing " and " commencement " of Copyright Act, 1911*—Period of assignment limited by Act—Different periods of limitation—Effect—Copyright Act,* 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 5, *sub-s.* 2; *s.* 24, *sub-s.* 1 (*a*).

The proviso to s. 5, sub-s. 2, of the Copyright Act, 1911, is as follows: "Provided that, where the author of a work is the "first owner of the copyright therein, no assignment of the copy-"right, and no grant of any interest therein, made by him "(otherwise than by will) after the passing of this Act, shall be "operative to vest in the assignee or grantee any rights with "respect to the copyright in the work beyond the expiration of "twenty-five years from the death of the author, and the rever-"sionary interest in the copyright expectant on the termination "of that period shall, on the death of the author, notwithstanding "any agreement to the contrary, devolve on his legal personal "representatives as part of his estate, and any agreement entered "into by him as to the disposition of such reversionary interest "shall be null and void. . . . ."

By s. 24, sub-s. 1: "Where any person is immediately before "the commencement of this Act entitled to any such right in any "work as is specified in the first column of the First Schedule to "this Act, or to any interest in such a right, he shall, as from that "date, be entitled to the substituted right set forth in the second "column of that schedule, or to the same interest in such a "substituted right, and to no other right or interest, and such "substituted right shall subsist for the term for which it would "have subsisted if this Act had been in force at the date when "the work was made and the work had been one entitled to "copyright thereunder: Provided that—(*a*) if the author of any "work in which any such right as is specified in the first column "of the First Schedule to this Act subsists at the commencement "of this Act has, before that date, assigned the right or granted "any interest therein for the whole term of the right, then at "the date when, but for the passing of this Act, the right would "have expired the substituted right conferred by this section "shall, in the absence of express agreement, pass to the author "of the work, and any interest therein created before the com-"mencement of this Act and then subsisting shall determine ". . . ."

The effect of proviso (*a*) to s. 24, sub-s. 1, of the Act is that, if before the commencement of the Act an author assigned his right in an existing work, then at the date when but for the passing of the Act his right would have expired, the substituted

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right conferred by the Act is to pass to him, and this proviso is not qualified by the proviso to s. 5, sub-s. 2, the effect of which is that, if between the date of the passing of the Act and the date of its commencement the author assigned his copyright under the Act in works to be produced by him after its commencement, there should vest in the assignee no rights with respect thereto beyond the expiration of twenty-five years from the death of the author.

Decision of Morton J., ante p. 608 reversed.

Appeal from a decision of Morton J. (1)

Mr. Samuel Coleridge-Taylor (hereinafter called "the composer") was the composer of a musical work entitled "A Tale of Old Japan," first published in England in September, 1911, and the first owner of the copyright therein. On March 11, 1912, he executed a document headed "Memorandum of Agreement" made between himself as vendor and Novello & Co., Ld. (hereinafter called "the company"), as purchasers whereby it was agreed that in consideration of the sum of 3¾*d.* for every copy to be published and sold by the company, to be paid by them to him so long as the copyright should last, they should receive in absolute purchase the copyright and right of publication, representation, and performance, and all other the rights, property and interests intended to be thereby assigned. The composer, as beneficial owner, thereby assigned to them all his copyright and right of publication, representation, and performance of and in "A Tale of Old Japan," including the title thereof, for the United Kingdom of Great Britain and Ireland, including the Channel Islands, and its colonies and dependencies, and for all foreign countries, and all other the property, rights and interests whether at law or in equity of the composer therein or thereto to hold the same unto the company for their absolute property; and the company thereby agreed with the composer that they would cause to be entered in proper books to be kept by them a true account of all copies of "A Tale of Old Japan" sold by them and would allow the account to be inspected at all reasonable times by the composer and would pay or cause to be paid to him the aforesaid sum of 3¾*d.* for each copy published and sold on or about February 1 in each year so long as the copyright should last.

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(1) Ante, p. 608.

The composer died on September 1, 1912. Letters of administration of his estate were granted to Mrs. Jessie Sarah Fleetwood Coleridge-Taylor, his widow, on October 16, 1912. On March 17, 1930, she assigned to herself, to Mrs. Gwendolen Dashwood, the composer's daughter, and to Mr. Hiawatha Bryan Coleridge-Taylor, his son, the copyright of and in his published and unpublished works and all performing and mechanical rights and all other rights in respect of the same so far as then vested in her as legal personal representative, together with all future rights in respect of any of the foregoing that might arise either under existing statutes or by law relating to copyrights or under any future statutes and together with all manuscripts, subject nevertheless to and with the benefit of such contracts, licences and agreements as had been entered into by the composer or by her as his legal personal representative, to hold unto her and the daughter and son as tenants in common in equal shares absolutely.

In this action, commenced on August 20, 1937, the assignees under the document of March 17, 1930, claimed (1.) a declaration that they were entitled to the copyright in "A Tale of Old Japan" as from September 1, 1937, twenty-five years from the death of the composer, free from any right or interest of the company, and (2.) an injunction to restrain the company, their servants and agents from infringing that copyright by reproducing or performing or authorizing the reproduction or performance in public of the work after that date.

The Copyright Act, 1911, received the Royal Assent on December 16, 1911. By s. 37, sub-s. 2 (*a*), it was to come into operation in the United Kingdom on July 1, 1912, or such earlier date as might be fixed by Order in Council. No such earlier date was fixed.

MORTON J. gave judgment for the plaintiffs, holding that, as the document of March 11, 1912, was executed after the passing of the Act, the proviso to s. 5, sub-s. 2, applied to the transaction and that the proviso to s. 24, sub-s. 1, by virtue of which the company contended that their interest in the work would continue till September, 1953, did not apply. His Lordship also held on the consideration of certain antecedent negotiations that before the passing of the Act there was nothing amounting to an assignment at law or in equity.

The company appealed.

K. E. Shelley K.C. and *Macgillivray* for the appellant company. When the document of 1912 was executed, the composer's rights were those prevailing under the existing law and would have expired in September, 1953, forty-two years after the date of publication. Under s. 24, sub-s. 1, of the Act of 1911 and the First Schedule thereto, a person entitled immediately before the commencement of the Act to both copyright and performing right became entitled to copyright as defined by the Act. This was to subsist " for the term for which it "would have subsisted if this Act had been in force at the "date when the work was made," i.e., fifty years from the death of the author (s. 3). In the present case that would be till 1962. The effect of the proviso to s. 24, sub-s. 1, was to preserve to assignees such as the company the rights they had acquired (i.e., the copyright until forty-two years from the date of publication) and to confer on the author or his legal personal representatives (see s. 24, sub-s. 2) the copyright for the additional period during which it continued under the Act. The present case is exactly covered by this proviso. It is declared by s. 24, sub-s. 3, that : " Subject to "the provisions of section nineteen subsections (7.) and (8.) "and of section thirty-three of this Act, copyright shall not "subsist in any work made before the commencement of "this Act, otherwise than under, and in accordance with, the "provisions of this section." Apart from these three defined exceptions s. 24 alone deals with copyright in any work produced before the commencement of the Act. The proviso to s. 5, sub-s. 2, has no application to such copyright. It can only apply to new copyright under the Act in works produced after it came into force. The first reference to copyright therein can only be to new copyright under the Act, and in the proviso to the section it should be given the same meaning. Moreover, s. 5 is a general section and s. 24 has a limited particular application, forming a complete code for dealing with the rights existing before the commencement of the Act: *Falcon* v. *Famous Players Film Co.* (1); *Mansell* v. *Star Printing and Publishing Co. of Toronto.* (2) Throughout the Act the word "copyright" is used in the sense of the definition in s. 1, save in the proviso to s. 3, in s. 19, sub-s. 7 (*c*), in s. 19, sub-s. 8 (ii.), and in s. 33, where the context makes it clear that pre-Act copyright is referred to.

Evershed K.C. and *F. E. Skone James* for the respondents. In the proviso to s. 5, sub-s. 2, the expression "copyright" includes pre-Act copyright. The mischief it was meant to remedy was the danger of an author being persuaded by a publisher to assign the rights in all his works between the passing and the commencement of the Act. Effect must be given to the words "after the passing of the Act." The words used are perfectly clear. Specific matter is being dealt with in s. 5, sub-s. 2, whereas the proviso to s. 24, sub-s. 1, is dealing with generalities. The generality of the latter must give way to the specific enactment of the former. If there be any inconsistency, the Court must construe the later part of the Act so as to give effect to the earlier part. If necessary the proviso to s. 24, sub-s. 1, should be read as relating to assignments made before the passing of the Act. The proviso to s. 5, sub-s. 2, falls into two halves, the first limiting assignments to a period of twenty-five years from the author's death, the second vesting the reversionary interest in his legal personal representatives. The two are quite independent. In the assignment of March 11, 1912, the meaning of the word "copyright" is not limited by any particular statute, but deals with that class of rights known as copyright in an absolutely general way. It was an assignment of copyright within the meaning of s. 5, sub-s. 2, which

(1) [1926] 2 K. B. 474.

(2) [1937] A. C. 872.

had the effect of limiting and partly rendering inoperative what would otherwise have been the general effect of the assignment. "Copyright" here means a particular category of rights, and is not confined to rights under one Act or under another.

The following judgment of the Court (Sir Wilfrid Greene M.R., Scott and Clauson L.JJ.) was delivered by Sir Wilfrid Greene M.R.: The plaintiffs in the action out of which this appeal arises, claim, as the representatives of the late Mr. Samuel Coleridge-Taylor, to be entitled to the copyright in a musical work entitled "A Tale of Old Japan," composed by Mr. Coleridge-Taylor, and first published in England during the year 1911. They say that notwithstanding an agreement of March 11, 1912, made between Mr. Coleridge-Taylor and the defendants, they became entitled by virtue of the proviso to s. 5, sub-s. 2, of the Copyright Act, 1911, to a reversionary interest in the copyright in that work. The reversionary interest to which that proviso refers would be an interest which, on the facts of this case, would begin in September, 1937. The writ was issued on August 20, 1937. The reversionary interest, if it exists for the benefit of the plaintiffs as representing Mr. Coleridge-Taylor, would be in respect of the period beginning on September 1, 1937, and would extend for the remainder of the statutory period of copyright, that is to say a further twenty-five years.

Now, Mr. Coleridge-Taylor died on September 1, 1912. On December 16, 1911, the Royal Assent was given to the Copyright Act, 1911, and by s. 37, sub-s. 2 (*a*), of that Act, the Act was to come into operation in the United Kingdom on July 1, 1912, or such earlier date as might be fixed by Order in Council. No such earlier date was fixed, and accordingly the date of commencement of the Act was July 1, 1912. It will be seen, therefore, that the agreement to which I have referred was dated between the passing of the Act and its commencement, and that is a circumstance relied upon by the plaintiffs in the action to bring them within the proviso to sub-s. 2 of s. 5, which deals with reversionary interest.

One or two more dates may be given before I come to examine more closely the questions that arise. If the Act of 1911 had not in fact been passed, the copyright under the old law would have expired in September, 1953, that is forty-two years from the date of publication of the work. Under the Act of 1911, which extends the period of copyright, the copyright would expire in 1962.

Now, the question depends upon the construction of two provisions of the Copyright Act read in relation to one another. One is the provision in s. 5 to which I have referred, and the other is s. 24, and I shall have to examine both those provisions with some care.

It will be convenient, before I come to look at the Act, to refer to the terms of the agreement of March 11, 1912, which was made between Mr. Coleridge-Taylor (called " the vendor ") of the one part, and the defendants, Novello & Co. (called " the purchasers ") of the other part. It provides that in consideration of the specified royalty the purchasers should receive in absolute purchase the copyright, and right of publication, representation and performance, and all other the rights, property and interests intended to be thereby assigned. Then Mr. Coleridge-Taylor as beneficial owner assigned all the copyright and rights of publication, representation and performance of him, the vendor, of and in the work in question, and all other the property, rights and interests whether at law or in equity of him, the vendor, therein or thereto to the purchaser absolutely. Of course, when that document was executed, the Act not having come into force, Mr. Coleridge-Taylor's only rights under the law in respect of artistic property in this work, were rights under the then existing law. That document, at the time it was executed, was only effective to vest those rights in the purchaser.

I now turn to a consideration of the Act, and before coming to the particular examination of the two sections in question, there are one or two general observations to be made. The Act is a consolidating and amending Act, and it modifies in very many substantial particulars the previous law. I need only mention, because they are relevant to the present inquiry, three matters in respect of which alterations were made: firstly, an alteration in the pericd of copyright; secondly, the inclusion within the scope of copyright of what had been dealt with by separate legislation—namely, performing rights; and thirdly, the inclusion within the scope of copyright of what had previously been the common law rights in respect of unpublished works. The Act contains a comprehensive definition of " copyright " as it is to subsist for the future, and within that definition are included not merely other matters, but the two last mentioned matters, the performing rights and the common law rights, and one other which I should have mentioned—namely, the right of making records or other mechanical contrivances for reproduction. That right is now to be included within the bundle of rights covered by the statutory definition of " copyright." It will be convenient for the purposes of phraseology in the course of this judgment to refer to copyright as it existed under the previous legislation as " old copyright " (remembering that copyright did not include performing rights, they being the subject-matter of separate legislation), and to describe as " new copyright " the bundle of rights included under the statutory definition of copyright in the Act of 1911.

The general scheme of the Act is to provide in Part I. for Imperial copyright, and that part is divided by cross-headings into separate fasciculi of sections. Broadly speaking it is, I think, correct to say that the scheme upon which the Act is drawn up is to deal with copyright law as it is to be under the Act when it comes into force, leaving for special treatment a subject which required special treatment—namely, the grafting into the new and comprehensive code of law all works in respect of which copyright, performing rights, and common law rights existed under the old law. The Act, with one or two exceptions the reasons for which are obvious on their face, deals down to s. 16 with copyright on the basis that I have described. When we come to s. 16, we find that it is the first of a group of sections headed "Special provisions "as to certain works." That cross-heading includes ss. 16–24 inclusive, and among the works in respect of which special provisions are made are existing works, and they are dealt with in s. 24.

Before coming to examine that section, I must make a reference to another section included under the same sub-heading—namely, s. 19. That was a section which dealt in detail with the new position introduced consequent upon the inclusion in the scope of the protection of copyright of the right to make records and mechanical methods of reproduction. Under sub-s. 7, para. (*c*), of s. 19 a provision is made whereby the benefit of this new right, namely, the exclusive right of making records, is reserved to the author of the work notwithstanding any previous assignment of copyright. That, of course, was an obvious piece of justice, because when an author before this Act had assigned copyright, the assignee acquired no rights with regard to the making of records because the author had not got such rights. Accordingly, that particular new right was reserved to the author, and, in passing, I must just mention sub-s. 8. That provides for the term during which the copyright in the matter of making records, etc., is to subsist in the case of contrivances made before the commencement of the Act.

I am reminded that in para. (*c*), which preserves this new right to the author, it is preserved notwithstanding any assignment made before the passing of this Act of the copyright in a musical work. Accordingly, the passing of the Act there is taken as the datum line.

The two last general observations that I wish to make before I come to s. 24 are, firstly, that under s. 31 copyright and similar rights in works whether published or unpublished, otherwise than under and in accordance with the provisions of the Act, are abrogated, of course, as from the date of the commencement of the Act, the scheme being to substitute for pre-existing rights the new statutory provisions ; secondly, throughout this Act we are told by Mr. Macgillivray, and it is not disputed, that with the exception of four cases where the context makes the matter perfectly clear the word "copyright" is used, as one would expect it to be used, in the sense of the statutory definition. I say "four cases," but it is said that the proviso which is now in controversy is another case where the word "copyright" is not to be confined to copyright as defined by the statute in s. 1, sub-s. 2.

I now turn to s. 24. That section deals, as I have said, with existing works, and it is in that section that one would expect to find the relevant provisions with regard to the duration of copyright and the nature of the right of copyright which is to be given by the law in respect of such works. I propose to read first sub-s. 3, which says this: "Subject "to the provisions of section nineteen subsections (7.) and "(8.)"—to both of which I have referred, the only relevant paragraph in sub-s. 7 being para. (*c*)—" and of section thirty-"three of this Act"—I need not refer to that—"copyright shall "not subsist in any work made before the commencement of "this Act, otherwise than under, and in accordance with, the "provisions of this section." Now, the work in question was a work made before the commencement of this Act, and Parliament in this sub-section is indicating with perfect clarity and complete decisiveness, that in such a work copyright is not to subsist otherwise than under and in accordance with the provisions of this section. No clearer way could have been found by Parliament, I venture to think, of informing those interested that, if they wish to find what are the rights of copyright which are to subsist in such a work as the present, they are to look within the four corners of this section and not outside it, save in so far as sub-s. 3 itself tells them that they are to look outside it, by looking, where necessary, to s. 19, sub-s. 7; s. 19, sub-s. 8; and s. 33.

There are two further points to be observed bearing on the same matter of this sub-section. The sub-section does not say "subject to the provisions of this Act" or anything of that kind, nor does it contain any reference whatsoever to the particular proviso in s. 5 which is said to operate upon copyright in an existing work in the present case. It would be very inconvenient and misleading drafting if, having used that clear and emphatic language in sub-s. 3, the Legislature sub silentio had put into another section of the Act a provision which is going to affect copyright in existing works in a way not provided for in s. 24. However, if the Legislature had used sufficiently clear language to produce that result, effect would have to be given to it.

I now turn back to the earlier sub-sections of s. 24. Sub-s. 1 provides that: " Where any person is immediately "before the commencement of this Act entitled to any such "right in any work as is specified in the first column of the "First Schedule to this Act, or to any interest in such a right, "he shall, as from that date, be entitled to the substituted "right set forth in the second column of that schedule, or to "the same interest in such a substituted right, and to no "other right or interest, and such substituted right shall "subsist for the term for which it would have subsisted if "this Act had been in force at the date when the work was "made and the work had been one entitled to copyright "thereunder." Now, that is drafting mechanism for getting into the scheme of the Act the existing works and putting them on the same basis mutatis mutandis with new works to be made after the coming into force of the Act. The First Schedule to which reference is made is a schedule setting out in two columns the existing and the substituted right. In the case with which we have to deal of a musical work, the existing right is " both copyright and performing right," and the substituted right is " copyright as defined by this Act." For the purpose of the Schedule copyright and performing right in relation to the pre-existing law is to include the common law rights in respect of unpublished works.

Applying the language of sub-s. 1 to the facts of the present case, it seems to me quite clear, firstly, that Messrs. Novello & Co., the defendants, were immediately before the commencement of this Act, namely, immediately before July 1, 1912, entitled to copyright and performing right, the existing rights as defined in the First Schedule, their title to those rights being, of course, derived from the author, who was the first proprietor of them, under the agreement in question. Now as they, quite clearly as a matter of language, satisfy that definition, we have to see what it is that the sub-section gives them. It gives them the substituted right specified in the Schedule, namely, copyright under the Act, and it gives that copyright to them for a period which, upon the facts of this case, will expire in September, 1962. Just to be sure that I have stated it correctly, in point of duration, the right which sub-s. 1 of s. 24 gives to Messrs. Novello & Co., assuming the sub-section applies to them, is a right which will expire in 1962, whereas the right which they had obtained under the agreement, that is to say the assignment of the old copyright, was one which would have expired in September, 1953.

Now, the term of the copyright having been extended, the amount of the extension being greater or less according to the circumstances of the individual case, the Legislature, of course, had to make provision for the added term of copyright. Obviously there would have been some ground for complaint, indeed substantial ground for complaint, on the part of authors and their representatives, if this statutory windfall in the shape of an extended term of copyright had fallen into the pockets of purchasers of the old copyright, and the moral claim of the authors to have that windfall themselves was one which Parliament recognized subject to a qualification conferring certain rights on the purchasers, into which I need not go. But the windfall itself is preserved for the authors under proviso (*a*) of sub-s. 1 of s. 24. Omitting the special rights given to the purchaser of the old copyright, that proviso says this: "if the author "of any work in which any such right as is specified in the "first column of the First Schedule to this Act subsists at "the commencement of this Act has, before that date, assigned "the right or granted any interest therein for the whole term "of the right, then at the date when, but for the passing of "this Act, the right would have expired the substituted right "conferred by this section shall, in the absence of express "agreement, pass to the author of the work, and any interest "therein created before the commencement of this Act and "then subsisting shall determine. . . . ."

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Applying the language of that proviso to the facts of this case, it will be seen that it fits the facts precisely. Before the date of the commencement of the Act, Mr. Samuel Coleridge-Taylor, the author of the work in question, in whom the existing rights specified in the first column of the First Schedule subsisted at the commencement of the Act, assigned that right for the whole term. He had assigned it by the agreement. The substituted right, which, by virtue of that assignment, is obtained by Messrs. Novello & Co. immediately the Act comes into force, is to inure for the benefit of the author to this extent, that during the period from September, 1953, when the old copyright would have expired, until September, 1962, when the new copyright will expire, the copyright is preserved to the author under this proviso. It seems to me that upon the mere language of that proviso it is one which precisely covers the facts of this case, and it will be seen that it is impossible to give to the proviso to sub-s. 2 of s. 5 the meaning for which the plaintiffs contend in a way which will give any consistent meaning to proviso (*a*) to sub-s. 1 of s. 24. I will examine that a little further when I come to deal with s. 5 itself.

It seems to me, therefore, that looking at s. 24 in the way in which the Legislature itself directs me to look at it, namely, as being a special provision as to a certain class of works, that is to say existing works, I find in that section a clear statement of what the law is to be as affecting this particular case, and cases like it. On general principles where a special matter is dealt with specially in a section or series of sections, it is legitimate to approach the question of construction with a strong assumption that the special section or sections dealing with that matter will be found to constitute a complete code save in so far as the special sections themselves may point to something in the rest of the Act.

Now there is one further matter, not without importance, which I should mention on s. 24 before I come to s. 5, and it is this. I go back for a moment to sub-s. 3, the sub-section with which I started my examination of s. 24. It starts off by saying : " Subject to the provisions of section nineteen "subsections (7.) and (8.) of section 33 of this Act, copyright "shall not subsist in any work made before the commencement "of this Act, otherwise than under, and in accordance with, "the provisions of this section." It is important to notice that that sub-section, although its enacting words are directed to the subsistence of copyright, treats as germane to that provision something which is a pure matter of title to copyright, namely, the provision in sub-s. 7 (*c*), a section which deals with the question of title as between author and assignee—a subject-matter which, as will be seen when I come to s. 5, is similar in general character to that dealt with in the proviso to sub-s. 2 of s. 5—namely, the matter of title to copyright as between author and assignee—and it would indeed be curious if sub-s. 3 having in terms made its provisions subject to one sub-section which governs the relations between author and assignee in respect of one matter of title, should have omitted to refer to another provision in the Act which, if the plaintiffs are right, also deals with the question of title as between author and assignee.

Now s. 5 appears in the general part of the Act, the sub-title of which is " Rights," and it starts off by providing : "Subject to the provisions of this Act, the author of a work "shall be the first owner of the copyright therein." Then there are certain provisos. That language taken by itself is directed, in my view, clearly to the future. It is in accordance with what I venture to think is the broad scheme of the drafting of the Act that the general provisions should be drafted without reference to existing works, and that the existing works should be introduced into and grafted upon the system by means of a special provision. Sub-s. 2 proceeds to give the right to assign copyright. It says : "The owner of the copyright in any work may assign the right, "either wholly or partially, and either generally or subject to "limitations . . . . and either for the whole term of the "copyright or for any part thereof, and may grant any interest "in the right by licence . . . ." and then it must be a grant or assignment in writing. There again, treating that as dealing with new copyright which is to come into existence upon the

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commencement of the Act, the language is clear and precise and presents no difficulties. Sub-s. 2 gives the right to assign and to grant interests, but that sub-section is qualified by a proviso, and although, of course, it is not true to say that a proviso is always to be limited to the subject-matter upon which it is engrafted, nevertheless when one finds a proviso dealing in terms with a subject-matter of that character, it ought to be construed prima facie I should have thought as a qualification of what has gone before, and not as containing something new extending to a different matter.

Now the proviso echoes the language of the substantive part of the sub-section. It deals with assignment and grant of interest, which is precisely what was dealt with in sub-s. 2, and precisely the matters in respect of which the statutory rights to make assignments or grant interests is conferred. The proviso is as follows: " Provided that, where the author "of a work is the first owner of the copyright therein, no "assignment of the copyright, and no grant of any interest "therein, made by him (otherwise than by will) after the "passing of this Act, shall be operative to vest in the assignee "or grantee any rights with respect to the copyright in the "work beyond the expiration of twenty-five years from the "death of the author, and the reversionary interest in the "copyright expectant on the termination of that period shall, "on the death of the author, notwithstanding any agreement "to the contrary, devolve on his legal personal representatives "as part of his estate, and any agreement entered into by him "as to the disposition of such reversionary interest shall be "null and void. . . . ." Then there is a qualification which I need not read. Now reading that proviso in the light of the rest of s. 5 which has preceded it, and in particular in the light of the express grant in s. 2 of the right to assign—a grant which, I may say, was of course not required in respect of old copyright—it seems to me that its natural and obvious meaning is to be ascertained by reading the phrase " the copyright " in the sense of new copyright under the statutory definition. It is that subject-matter with which the substantive part of the sub-section is dealing and in respect to which the requisite right of assignment is being conferred. It seems to be the natural interpretation of the proviso to treat it as dealing with the same subject-matter; indeed I cannot think that any difficulty could possibly have been raised with regard to the operation of this proviso had it not been for one phrase, and that is that the assignments to which the proviso is directed are assignments made by the author "after the passing of this Act." It is said that the use of that phrase is sufficient to bring the present assignment within the scope of the proviso and accordingly to vest the reversionary interest in the copyright in the representatives of Mr. Coleridge-Taylor.

I will now look back, as I promised to do, to the provisions in s. 24, sub-s. 1 (*a*). That is dealing with assignments before the commencement of the Act. The proviso to sub-s. 2 of s. 5 is dealing with assignments after the passing of the Act. Now the two provisions cannot stand together consistently, in relation to assignments made between the passing and the commencement of the Act. It is easy to see, and I do not take up time in showing, why that is so, and the only argument which was advanced on behalf of the respondents in order to get out of that difficulty was to the effect that proviso (*a*) to sub-s. 1 of s. 24 is to be read as not applying to an assignment made between the date of the passing of the Act and the date of its commencement; in other words it would be limited, according to that argument, to assignments made before the passing of the Act. But that is not what proviso (*a*) says. It says, and says quite explicitly, that its provisions are to apply to assignments made before the commencement of the Act; and I am not prepared, in order to effect the reconciliation between the two sections which it is desired to effect, to do such violence to the language of this proviso having regard to the other matters germane to the construction of s. 24 to which I have already referred. It seems to me that the proviso to sub-s. 2 of s. 5 is one to which a perfectly clear and reasonable meaning can be given if it be confined to assignments—including, of course, in that term agreements to assign, which in equity operate assignments—under the Act, that is to say assignments of new copyright. It is, of course, very common for authors to enter into agreements with publishers in relation to future works, and an author, during the period between the passing and the commencement of the Act, might well enter into a contract with a publisher in relation to works which were going to be produced after the commencement of the Act. It appears to me that the proviso would cover a case of such an agreement and would have the effect of restraining, what I may call for convenience, the improvidence of the author by placing a statutory prohibition on assignments by him extending beyond the first twenty-five years following his death. That seems to me to give a reasonable and clear and grammatical effect to the reference in this proviso to the passing of the Act. Of course, with regard to works which come into existence after the commencement of the Act, the matter is quite clear. That construction has the further advantage of giving to the word " copyright " in this sub-section—both the substantive part of it and the proviso—a consistent meaning, limited, as one would expect to find it limited, to copyright as defined by the Act, what I have described as " new copyright," a different matter with different elements in it to any copyright which existed before the Act, and including, as I have said, certain matters, performing rights and common law rights, which did not fall under old copyright.

Now, I think that I have subjected the relevant sections to a sufficient analysis to show that in my opinion s. 24 is to be read as a comprehensive section dealing with existing works, and that the proviso to sub-s. 2 of s. 5 does not operate to extend, or to qualify, anything that is found in s. 24, and I find it impossible to read into sub-s. 3 of s. 24 by implication what it would be necessary to read in by implication—namely, a reference to the proviso to sub-s. 2 of s. 5.

There is one other aspect of this question of construction to which I can usefully refer. If the effect which I have given to the language of the Act as applied to this particular case is the true one, Messrs. Novello & Co., as from the date of the commencement of the Act, were the owners of the copyright within the meaning of sub-s. 2 of s. 5. They became such owners by virtue of the operation of s. 24, and sub-s. 2 of s. 5 gives to them what they had not got before, and which it required a statutory provision to give to them, the right to assign the new copyright granted by the Act in their capacity as owners. The proviso, of course, does not operate, because at the date when the Act commences the copyright is vested in them and not in the author. If Mr. Coleridge-Taylor had happily remained alive, and after the date of the commencement of the Act had assigned the new copyright to the publishers, of course that assignment would have been affected by the proviso and limited in its operation by it; but as the matter stands, the only right which the publishers get upon the Act coming into operation is the new copyright, and in respect of that they get the statutory right to assign.

Morton J. decided in favour of the plaintiffs, and he so decided being influenced, I think, to a considerable extent by a concession which was made as appears from his judgment with regard to the meaning of the word "copyright" in the proviso to sub-s. 2 of s. 5. He proceeded on the footing that the word "copyright" in that proviso admittedly covered old copyright. The contrary in point of fact had been argued before him, but he dealt with it as a conceded construction. I, myself, do not find it possible to take that view as to the meaning of "copyright" in the proviso for the reasons I have given, but the learned judge was undoubtedly affected in his judgment by that meaning so given to the word. The learned judge also thought that of the two inconsistent provisions—because, as I have shown, they are inconsistent—the proviso to sub-s. 2 of s. 5, and the proviso (*a*) to sub-s. 1 of s. 24, and indeed s. 24 itself, the provisions in s. 5 should be preferred to those in s. 24 on the ground that s. 5 was a more special subject-matter. I do not, of course, wish to throw any doubt upon the principles of construction on which the learned judge relied in taking that view, but it seems to me that the comparative weight to be given to the language of the two sections is to be determined by the considerations which I have ventured to express in the course

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of this judgment, rather than by a more formal rule such as that which he applied. After all, the construction of this Act of Parliament, as the construction of all Acts of Parliament, is a matter of the language used by the Legislature in the whole Act, giving to each portion of it such force as may be dictated by the particular position in which it finds itself, or the particular collocation of sections, and so forth, of which it forms part. On this principle I have endeavoured to approach the construction of this matter, and in the judgment of the Court the appeal must be allowed and the action dismissed with costs here and below.

The other matter arising in the action, based upon an alleged agreement to assign made before the passing of the Act, was not opened before us. That alleged agreement, or at any rate, any effective operation of it, was negatived by the learned judge, and it has not been necessary to discuss that question in view of the decision to which we have come upon the actual document of March, 1912.

Solicitors: *Field, Roscoe & Co.*; *Syrett & Sons.*

F. H. C.

TATE *v.* CREWDSON.

MORTON J.

1938 May 18.

[1938. T. 124.]

Mortgage—Two joint borrowers—One also surety—No demand by lender for payment off of mortgage—Surety entitled, on repayment to lender of own half and interest, to an order on other joint borrower to repay his half.

A bank lent money on mortgage to two joint borrowers, one, the plaintiff, being surety for the other, the defendant, for the full amount lent. The borrowers, and the plaintiff as surety, covenanted jointly and severally to repay the loan on demand and interest meantime half-yearly. The mortgage gave to the bank power to sell and to appoint a receiver immediately at any time after demand for repayment, without notice to the borrowers; and it provided that, as between the borrowers and their property and the surety and his, the former should be primarily liable under the mortgage, without affecting the bank's rights and remedies, and that the surety, although surety for the borrowers only as between himself and them, should, as between himself and the bank, be liable to the bank as a principal debtor under the mortgage. The borrowers later agreed between themselves that the money should be deemed to have been lent in the proportion of one-half to each of them, and that each should be liable to repay his half and to pay the interest on it meanwhile, should be able, under the mortgage, to recover any payments made by him in respect of the other's half and interest, and should be entitled, despite anything in the mortgage, to the same security for payments made by him in respect of the other's half as the bank would have if that half were not paid; and the agreement provided that neither borrower should be able to compel the other to repay his half for ten years from the date of the agreement so long as the interest owing thereon should be paid within thirty days of the same becoming due.

The defendant failed to pay certain interest due from him within thirty days of its becoming due. The bank did not at any time demand repayment of the loan:—

Held, that, on the plaintiff's repaying his half of the loan, the Court would order the defendant to repay his half.

Ascherson v. *Tredegar Dry Dock and Wharf Co.* [1909] 2 Ch. 401, followed, and observations thereon of Sargant L.J. in *In re Anderson-Berry* [1928] 1 Ch. 290, 307, 308, considered.

WITNESS ACTION.

This was an action by one of two joint borrowers under a mortgage for a declaration, under an agreement made between him and the other borrower after the mortgage, that he was entitled, in the event which had happened and on paying off half of the money lent, to an order on the other borrower to repay the other half.

By a mortgage dated February 8, 1935, and made between Mr. Henry Burton Tate (hereinafter called "the plaintiff") and Mr. Roger Bevan Crewdson (hereinafter called "the defendant") of the first part (thereinafter together called "the borrowers"), the plaintiff (thereinafter called "the surety") of the second part, and Lloyds Bank, Ld. (thereinafter called "the bank"), of the third part, after reciting (inter alia) as follows: "The bank at the request of the "surety have agreed to advance to the borrowers the sum of "25,000*l.* upon having the repayment thereof with interest as "hereinafter mentioned secured in manner hereinafter appearing and it was a term of such agreement that interest in "arrear shall be capitalised in manner hereinafter appearing," it was witnessed as follows: "Now this deed made in "pursuance of the said agreement and in consideration of the "sum of 25,000*l.* paid to the borrowers at the request of the "surety by the bank (the receipt of which sum the borrowers "hereby acknowledge and the payment whereof in manner "aforesaid the surety hereby admits) Witnesseth and it is "hereby agreed and declared as follows, that is to say . . . ."

Clause 1 provided: "The borrowers and the surety hereby "jointly covenant and each of them severally covenants with "the bank to pay to the bank on demand the sum of 25,000*l.* "and also any sum which may be added to principal under "sub-clause (*a*) of this clause together in each case with interest "thereon in the meantime at the rate of one pound per cent. "above bank rate for the time being in force with a minimum "of four pounds per cent. per annum commencing in the case "of the said sum of 25,000*l.* from the 30th day of November, "1934, and in the case of any and every sum to be added to "principal under sub-clause (*a*) of this clause from the date "when such sum first becomes due as interest hereunder, such "interest to be paid and computed both before and after any "demand (and as well after as before any judgment or order

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"to be recovered or made hereunder) up to the date of actual "payment of principal and to be paid (until such demand shall "have been made and complied with) by half-yearly payments "on the 30th day of May and the 30th day of November in "every year." The principal sum under that clause was payable on demand.

It was admitted that it was the bank's practice to charge interest, not as at May 30 and November 30 in each year, but as at June 30 and December 31 in each year, that both the plaintiff and the defendant were well aware of and acquiesced in that practice, and that the dates June 30 and December 31 were by mutual consent of the plaintiff, the defendant, and the bank treated as substituted for the respective dates for payment of interest mentioned in the said mortgage.

Sub-clause (*a*) of clause 1 contained a provision for the capitalization of interest fourteen days in arrear, and sub-clause (*b*) related to the payment off of such portion of the principal money as should for the time being represent capitalized interest. In clause 2 of the mortgage the plaintiff, as beneficial owner, assigned to the bank by way of mortgage certain reversionary interests subject to certain prior interests. In clause 3 there was a provision for redemption. Clause 4 gave to the bank certain powers expressed to be exercisable "at all times during the continuance of this security and as "well before as after demand for payment of the moneys "hereby secured." Clause 7 was: "The power of sale and "of appointing a receiver vested in the bank by virtue of this "deed and the relevant statutes shall be immediately exercisable by them (without the necessity of giving any notice in "that behalf to the borrowers) at any time after demand for "payment of the moneys hereby secured." By sub-clause (*a*) of clause 10: "Sub-section (1.) of section 93 of the Law of "Property Act, 1925, shall not apply to this security." By sub-clause (*b*): "As between the borrowers and their property "on the one hand and the surety and his property on the other "hand the borrowers and their property shall be primarily "liable hereunder in exoneration of the surety and his property "but this provision shall not affect the bank or their right to "resort to and enforce all or any rights or remedies available "under this deed or otherwise at such times and in such order "and manner as they shall think fit." By sub-clause (*c*): " Although as between the borrowers and the surety the surety "is only a surety for the borrowers yet as between the surety and "the bank the surety shall be liable as a principal debtor for all "moneys and obligations hereby secured and shall not be "released by time or indulgence being given to or any arrange-"ment or alteration of terms being made with the borrowers "or by any release or dealing by the bank or by any act "omission matter or thing whatsoever whereby the surety as "a surety only would or might have been released."

By an agreement dated November 26, 1935, and made between the plaintiff of the one part and the defendant of the other part, it was agreed that, notwithstanding the borrowers' joint and several liability, the following provisions should apply: "(*a*) The amount borrowed on the joint account as aforesaid "shall be deemed to have been borrowed as to one moiety for "the benefit of Mr. Tate and as to the other moiety for the "benefit of Captain Crewdson and each of them shall be liable "for the repayment of such loan to the extent of one half. "(*b*) Mr. Tate and Captain Crewdson shall respectively be "liable for the payment of the interest payable to Lloyds from "time to time to the extent of the amount of their respective "moieties of the loan for the time being owing. . . . . (*d*) It is "hereby agreed that Lloyds mortgage "—that was the mortgage of February 8, 1935—"shall enure for the benefit of Mr. "Tate and Captain Crewdson to the extent to which any "payment may be made by either of them in respect of the "moiety of the other of them and the interest thereon, and "nothing herein or in Lloyds mortgage contained shall prevent "Mr. Tate or Captain Crewdson being entitled to the same "security for any payment made by him in respect of the half "for which he is not primarily liable hereunder as Lloyds Bank "would have been entitled to had such last mentioned moiety "not been so paid as aforesaid. . . . ." There followed the proviso: "Provided always that as between themselves "neither Mr. Tate nor Captain Crewdson shall be at liberty "to compel the other of them to repay his moiety whether to "Lloyds Bank or otherwise for a period of ten years from the "date hereof so long as the interest owing thereon shall be paid "within thirty days of the same becoming due."

It was alleged in the statement of claim, and not disputed in the defence, that the defendant failed and neglected to pay the half-year's interest which was charged by and payable to the bank on June 30, 1936, December 31, 1936, and June 30, 1937, upon his moiety of the sum of 25,000*l.* or any part thereof, with regard to the sum payable on June 30, 1936, until September 11, 1936, with regard to the sum payable on December 31, 1936, until April 2, 1937, and with regard to the sum payable on June 30, 1937, until October 18, 1937.

The plaintiff issued a writ on January 20, 1938, claiming an order that on payment by the plaintiff to the bank (at such time and place as the Court might direct) of one moiety of the principal moneys and interest owing on the mortgage the defendant should pay to the bank (at such time and place as aforesaid) the remaining moiety of the said principal moneys and interest.

Cyril J. Radcliffe K.C. and *G. P. Slade* for the plaintiff. This case is covered by *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), although here the money payable under the mortgage is expressly payable on demand. In that case the bank did not, in fact, make any demand. That is made clear from the observations on the case made by Sargant L.J., who was one of the counsel in it, in *In re Anderson-Berry.* (2) Between those two decisions came *Bradford* v. *Gammon* (3), where Eve J. held that the plaintiff was not entitled to payment off of an overdraft on a partnership account at a bank. Eve J. distinguished the case from *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) on the ground that in that case the bank had demanded payment; but it is most unlikely that he would have done so had he had the advantage of the elucidation by Sargant L.J. in *In re Anderson-Berry.* (2) [They referred to

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(1) [1909] 2 Ch. 401.
(2) [1928] Ch. 290, 307, 308.
(3) [1925] Ch. 132.

Morrison v. *Barking Chemicals Co.* (1)] The present case is one, strictly speaking, not of a surety's rights, but of construction of a covenant in a partnership deed that a partner's estate should be indemnified. [They referred to *Ranelaugh* v. *Hayes* (2); *Nisbet* v. *Smith* (3); and *Norton* v. *Ellam.* (4)] If a demand is necessary to give a creditor the right to sue the estate, time will not begin to run until the demand has been made. In the cases the general rule is expressed by the judges as being something which can hardly be argued about: and it is considered by Chitty J. in *In re J. Brown's Estate.* (5) In construing the surety's covenant, the demand is to be considered as a condition precedent; but it is not to be so considered in construing the principal's covenant. *Bradford Old Bank* v. *Sutcliffe* (6) was also a pure case of the Statute of Limitations, raising the question whether it applied to a particular claim.

It is quite plain that there is a general rule that, where there is a present debt and the promise is to repay on demand, the words "on demand," so far as any contractual obligations between the parties go, are mere surplusage: but it is open to the parties to stipulate that liability to pay is not to arise until demand has been made; the stipulation, however, must be a stipulation varying the general rule. The Court, if it finds in a surety covenant the words "on demand," does not necessarily regard the expression, even then, as a stipulation; it looks to see if it was intended to be a stipulation.

In the present case, the money is payable now, and by the debtor. The principle laid down in the cases suggests that the money cannot be got from the surety without placing on his co-surety his collateral obligation. In the present case the surety is bound to treat himself as under a direct obligation to pay: see also *Ex parte Whitworth. In re Mayor.* (7) The fact that a creditor knows that a person is a surety does not prevent him from suing without making a demand if the person who has undertaken the liability has undertaken it not as a

(1) [1919] 2 Ch. 325.
(2) (1683) 1 Vern. 189.
(3) (1789) 2 Bro. C. C. 579.
(4) (1837) 2 M. & W. 461.
(5) [1893] 2 Ch. 300.
(6) [1918] 2 K. B. 833.
(7) (1841) 2 Mont. D. & De G. 158.

surety but as a principal debtor. It is clear on the authorities that the use of the words "on demand" does not alter the matter at all. It all turns on the clause in the mortgage: and in the present case there is no stipulation at all in clause 1. The most that can be said is that "until such demand shall "have been made" means "assuming that a demand will be "made." The only other reference to "demand" is in clause 7, which confers the power of sale. [They referred to Coote on Mortgages, 9th ed., at p. 991.] There cannot be an exception to the general rule unless there is first a stipulation and then a demand in writing.

In the present case both borrowers have given a covenant which, as between them and the bank, must be treated as a covenant by principal debtors to repay a sum on demand. As between themselves they are sureties for each other so far as their covenant goes beyond their proper part of the loan: and what is more important, the plaintiff has put at risk for the bank these valuable reversionary interests, and it is with regard to that obligation, rather than the covenants, that he is described in the mortgage as surety. He is, in fact, given a separate clause in the mortgage in which he assigns his interest. The defendant, on the other hand, is at risk only with regard to his covenant. The right which, by a later agreement, the parties recognized that they had, of suing each other to compel payment off of the appropriate moiety at any time, was controlled by the terms of the agreement of November 26, 1935.

In those circumstances, it is a clear case of applying the Court's jurisdiction to release the surety. It does not matter for any purposes that no demand has been made on the surety. It cannot be necessary for a demand to have been made on the principal. That was never a relevant consideration. The sum borrowed is really a sum payable on demand, and the debt is a present debt. The Court should make an order, in accordance with *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), that, on the plaintiff paying his moiety, the defendant pay his moiety.

(1) [1909] 2 Ch. 401.

H. B. Vaisey K.C. and *Wilfrid M. Hunt* for the defendant. The question is whether the proviso means that there is to be no right of action, under the principle of relieving sureties, unless there is interest in arrear for more than thirty days. [They referred to Key and Elphinstone's Precedents in Conveyancing, 11th ed., vol. ii., pp. 27 and 28, under the heading "Capital and Interest Clauses."]

What the proviso means is that these two gentlemen said: "If at any moment the interest is in arrear for thirty days or "more I have the right to compel you to repay your half: but "unless there is interest in arrear our mutual rights of compul-"sion shall not arise." Such a reading produces, not a capricious, but, on the contrary, a reasonable result.

In the ordinary case the surety will not be relieved before the money is presently due. That is really what was decided in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) There is a distinction between the positions of the bank and the borrowers together, the bank and the plaintiff qua surety (the plaintiff being a principal debtor as between himself and the bank), and the borrowers inter se. [They referred to *In re Ledgard*. (2)]

The position in the present case is that there is nothing which can be enforced by the Court at the moment, because there has been neither a writ nor a demand. Therefore the Court cannot say that there is anything due to the bank. In *Bradford* v. *Gammon* (3) the Court laid a great deal of emphasis on the fact that no demand had been made. It is clear on the authorities that the plaintiff has no right of relief unless he can establish that there is a debt due and payable: *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) On the true construction of the mortgage, the expression "on demand" shows that there should be an actual demand.

Cyril J. Radcliffe K.C. and *G. P. Slade* in reply.

MORTON J. [after stating some of the facts substantially as set out above:] From the terms of the proviso in the agreement of November 26, 1935, it looks as if the parties contemplated that, unless some special provision was made, one or other of them would be at liberty to compel the other to repay his moiety, and the proviso seems to have been inserted in order to prevent such a compulsion from being applied during the period therein mentioned. [His Lordship then stated the remaining facts substantially as set out above, and continued :]

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(1) [1909] 2 Ch. 401.
(2) (1922) 66 Sol. J. 405.
(3) [1925] Ch. 132.

It is to be observed that, at the time when the writ was issued, the interest payable on June 30, 1937, had been paid, and the interest which became payable on December 31, 1937, was not thirty days overdue.

The arguments against the plaintiff, which have been put forward by Mr. Vaisey and Mr. Hunt in this case, are these. First of all they say that the proviso in the supplemental deed of November 26, 1935, really means that neither party is to have a right to compel repayment by the other unless at the time when one party seeks to compel such repayment there is some interest which is more than thirty days in arrear. Secondly, they say that, even if that contention is incorrect, apart altogether from the supplemental agreement, the plaintiff has no right to compel the defendant to pay off the mortgage to the bank.

Dealing first with the argument on construction, it appears that the words "for a period of ten years from the date hereof so "long as the interest owing thereon shall be paid within thirty "days of the same becoming due" lay down a period which comes to an end if an instalment of interest is not paid within thirty days of the same becoming due. One can well appreciate that it was of importance to each of the parties to satisfy himself that the other was a punctual payer of interest, and they may well have been content to allow the matter to go on, and the liability to remain, so long as the interest was punctually paid. Mr. Vaisey invited me to read the words "so long as" as meaning "provided that"; but, even if I were to substitute the words "provided that the interest owing "thereon shall be paid within thirty days of the same becoming "due," I think that I should have to treat the proviso as having the effect that, as soon as an instalment of interest is not paid within thirty days of the same becoming due, the period comes to an end. I think it would be straining the words of the proviso beyond any point which would be justified to read them as meaning: "provided that no interest owing thereon is "more than thirty days in arrear."

To my mind, the period specified by the proviso has come to an end and, therefore, I must now ascertain whether, apart from this proviso, the plaintiff would have been entitled to the relief which he claims in this action.

Mr. Radcliffe, for the plaintiff, has referred me to the case of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), and he has called attention to the fact that in that case Swinfen Eady J., as he then was, said: "The present action is not like *Dale & "Perry* v. *Lolley* (2), where a surety brought an action to compel "the debtor to pay a bill not due for twenty months, or *Hughes-"Hallett* v. *Indian Mammoth Gold Mines Co.* (3), where he asked "for indemnity against a future contingent liability. The "obligation of the executors is a present liability, and they are "entitled to the relief they ask. There must be a declaration "that the plaintiffs, as executors of the deceased, are entitled "to be discharged and exonerated from all liability under the "guarantee by payment by the defendant company"—that is the principal debtor—"to the bank of the 17,219*l.*, with "interest. . . . ." and so on. In that case there were several co-guarantors of the company's account with the bank. The report of the case states that "Edward Ascherson" (one of the guarantors) "had died, having appointed the plaintiffs his "executors. The bank heard of his death on June 30, 1908, "and at once closed the old account with an overdraft of "17,219*l.* and opened a new account for the defendant company "under the continuing guarantee. The bank informed the "defendant company of this change in the account, and "obtained the names of the executors, to whom they gave "formal notice of their liability under the guarantee, but they "did not demand payment of the overdraft either from the

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(1) [1909] 2 Ch. 401, 409.
(2) (1808) 2 Bro. C. C. 582*n*.
(3) (1882) 22 Ch. D. 561.

"defendant company or the guarantors." The position then was that there was a liability of the plaintiff executors under a guarantee, but there had been no demand for payment by the bank and there was, in the view of the Court, a present liability. Under these circumstances the Court held that the executors were entitled to compel the principal debtor to pay what was due from him.

That case was further explained by Sargant L.J., who had appeared as counsel in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), in *In re Anderson-Berry* (2), when he said this: "In such cases as that of *Ascherson* v. *Tredegar Dry Dock and* "*Wharf Co.* (1) the jurisdiction which was exercised was to a "considerable extent quia timet, because there the position "was this, that the five directors of the company had given a "guarantee; then one of them died and the bank were quite "satisfied to rest on the guarantee. The deceased director "had left a large estate and they were perfectly satisfied with "his guarantee together with the other guarantees and they "were prepared to let the guarantee go on indefinitely. They "had ascertained the amount and the result would have been "that the company could have gone on trading with the benefit "of the guarantee on which this sum of 17,000*l.* had already "accrued and it would not have been necessary for the new "directors, or directors who came in, to join in any guarantee "to the same extent to which the original guarantor had joined "in the guarantee. I only mention those facts, because I was "counsel in that case, and I have some special acquaintance "with the facts, for the purpose of pointing out that there was "no probability at all at that time of the debt of the executors "of the testator being due within any measurable distance of "time, and yet it was held that they were entitled to come to the "Court and get an order on the company to pay the bank, "because this cloud should not be left hanging over the estate." It seems to me possible that, in using the words "being due" the learned Lord Justice meant "being demanded"; but that passage makes it clear—perhaps it was left a little obscure by certain passages in *Ascherson* v. *Tredegar Dry Dock and Wharf*

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(1) [1909] 2 Ch. 401.

(2) [1928] Ch. 290, 307, 308.

Co. (1)—that there was in fact no demand made by the bank in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1)

In *Bradford* v. *Gammon* (2), which was decided between *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) and *In re Anderson-Berry* (3), Eve J. held that the plaintiff in that case was not entitled to have a certain overdraft on the partnership account at the bank paid off. I need not deal with the case in detail because I think it was a decision upon the construction of a clause in the partnership articles in question; but the learned judge referred to *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) and distinguished it on the ground that there was in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) a demand for payment by the bank. I think that that particular ground of distinction cannot be relied upon, and that if Eve J. had had before him at that time the information which was subsequently given by Sargant L.J. in *In re Anderson-Berry* (3) he could not have distinguished *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) on that ground, though no doubt he would have arrived at the same conclusion on the construction of the particular document before him.

Ascherson v. *Tredegar Dry Dock and Wharf Co.* (1) appears to me to cover completely the case before me, unless it makes any difference that, in the case before me, the money due on the mortgage is expressed to be payable on demand. In every other respect the present case seems to come within *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), and it does not seem unreasonable, if there is a present liability for the payment of this large sum, that the plaintiff, who in fact provided the security for the sum, should be relieved of the cloud which is hanging over him.

Does it make any difference that, in the present case, the loan is expressed in the mortgage to be repayable on demand? Mr. Radcliffe, for the plaintiff, has referred me to the case of *Norton* v. *Ellam.* (4) The question there was when the Statute of Limitations begins to run upon a promissory note payable on demand. The Court held that the statute began to run from the date of the note and not from the date when demand was made. Parke B. said: "I entertain no doubt at all on "this point. It is the same as the case of money lent payable "upon request, with interest, where no demand is necessary "before bringing the action. There is no obligation in law to "give any notice at all; if you choose to make it part of the "contract that notice shall be given, you may do so. The "debt which constitutes the cause of action arises instantly "on the loan. Where money is lent, simply, it is not denied "that the statute begins to run from the time of lending. "Then is there any difference where it is payable with interest? "It is quite clear that a promissory note, payable on demand, "is a present debt, and is payable without any demand, and "the statute begins to run from the date of it. Then the "stipulation for compensation in the shape of interest makes "no difference, except that thereby the debt is continually "increasing de die in diem. It is quite different from the case "of a note payable at sight, because there, by the terms of the "contract, it must be shewn before the action is brought." Alderson B. said: "I am of the same opinion. It must be "so unless there is something to shew that a demand is to be a "collateral matter."

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(1) [1909] 2 Ch. 401.

(2) [1925] Ch. 132, 138.

(3) [1928] Ch. 290.

(4) 2 M. & W. 461.

In a subsequent case of *In re J. Brown's Estate* (1), to which I was also referred by counsel on both sides, it was held that a right of action under a covenant by a surety to pay on demand did not accrue against the surety's estate until demand was first made. After referring to the judgment in *Norton* v. *Ellam* (2) Chitty J. said: "That is a "general proposition and not one based upon the law merchant; "and, without going through the whole of the cases to which I "have referred in the course of the argument, it is plain that a "distinction has been taken and maintained in law, the result "of which is that where there is a present debt and a promise to "pay on demand, the demand is not considered to be a condition "precedent to the beginning of the action. But it is otherwise "on a promise to pay a collateral sum on request, for then the "request ought to be made before action brought." He then goes on to deal with the particular instrument before him and arrives at the conclusion which I have stated with regard to the surety; but I see no reason to doubt that Chitty J.'s view was that, so far as the principal debtor was concerned, there was an immediate liability on the making of the loan.

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(1) [1893] 2 Ch. 300, 304. (2) 2 M. & W. 461.

I shall refer briefly to one passage in the judgment in *Bradford Old Bank* v. *Sutcliffe*. (1) I need not deal with the facts of that case, but Scrutton L.J. said: "Even if the word 'demand' is "used in the case of a present debt, it is meaningless, and "express demand is not necessary, as in the case of a promissory "note payable on demand. . . . But it is otherwise where "the debt is not present but to accrue, as in the case of a note "possibly three months after demand, ... or where the debt "is not a present debt but a collateral promise."

In the present case I am invited to find that, on the construction of the mortgage, there is not a present liability upon the plaintiff and the defendant to pay the bank. I have carefully considered the arguments on construction which have been put before me by counsel for the defendant, but I cannot accept that view. I think that these gentlemen, to whom the money was paid jointly and both of whom under the terms of the deed were to be treated as principal debtors as between themselves and the bank, were under an immediate liability without demand. Applying to the case the test whether, if the bank had issued a writ, it would have been a complete answer to the bank's claim for the mortgagors to say: "You "have made no demand before action," it seems to me that that would have been no answer at all.

The result is that, in my opinion, the present case comes within the principles of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (2), and the supplemental agreement to which I have referred does not alter the legal position, because the period stipulated in the proviso to that deed has come to an end. The plaintiff is entitled to the relief which he claims.

Solicitors: *Kenneth Brown, Baker, Baker; Waterhouse & Co.*

(1) [1918] 2 K. B. 833, 848. (2) [1909] 2 Ch. 401.

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Dictum of SLESSER, L.J., at p. 906,
explained. FREDK. BERRY, LTD. *v.*
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[1937. L. No. 277.)

Landlord and tenant—Lease of self-contained shop—Covenant not to make alterations without lessors' consent—Proposed alterations—Extension of shop over adjoining land held on lease from separate landlord—" Improvements "—Damage to or diminution in the value of the premises—Consent unconditionally refused—Refusal whether unreasonable—Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 19, *sub-s.* 2.

The Landlord and Tenant Act, 1927, s. 19, sub-s. 2, provides: " In all leases whether made before or after the commencement " of this Act containing a covenant condition or agreement " against the making of improvements without licence or consent, " such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be " subject to a proviso that such licence or consent is not to be " unreasonably withheld; but this proviso does not preclude the " right to require as a condition of such licence or consent the " payment of a reasonable sum in respect of any damage to or " diminution in the value of the premises or any neighbouring " premises belonging to the landlord, and of any legal or other " expenses properly incurred in connection with such licence or " consent nor, in the case of an improvement which does not " add to the letting value of the holding, does it preclude the " right to require as a condition of such licence or consent, where " such a requirement would be reasonable, an undertaking on the " part of the tenant to reinstate the premises in the condition " in which they were before the improvement was executed."

By a lease made in 1931 the plaintiffs let to the defendants a shop in Bournemouth for a term of forty-two years at a rent of 3500*l.* a year to be increased in 1945 to a higher figure. The lease contained a covenant by the defendants " not without the " previous consent of the lessors to erect or suffer to be erected " any other building upon the said demised premises nor to make " or suffer to be made any structural alterations in or additions " to the demised premises."

The defendants proposed to enlarge the shop by taking down the greater part of its back wall and connecting it with premises to be erected on adjoining land held by them on lease from a different owner, to which additional premises the staircases and lavatories would be removed. The defendants applied to the plaintiffs for their consent to the proposed alterations, offering to reinstate the premises in the condition in which they were

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before the alterations were executed, to give satisfactory security for doing so, and to pay expenses properly incurred in connection with the consent. The plaintiffs declined to give their consent to the alterations.

In February, 1937, the plaintiffs brought the present action against the defendants claiming declarations that the alterations would not be " improvements " within the meaning of the above sub-section, and that if the plaintiffs withheld their consent it would not be " unreasonably withheld " within the meaning of that sub-section. The defendants counterclaimed declarations to the contrary effect respectively :—

Held, by the Court of Appeal (Slesser and MacKinnon L.JJ., Greer L.J. dissenting), (1.) That the proposed alterations would be " improvements " within the meaning of the sub-section, and (2.) that the consent of the plaintiffs to the proposed alterations was " unreasonably withheld " within the meaning of the sub-section.

Limitation of the meaning of the word "improvement" discussed.

Woolworth (F. W.) & Co., Ld. v. *Lambert* [1937] Ch. 37 considered.

Judgment of Simonds J. affirmed on the first point, and reversed on the second point.

Appeal and cross-appeal from the judgment of Simonds J.

By a lease dated February 27, 1931, Mr. G. E. Lambert and Mr. W. R. J. Lambert, estate owners (hereinafter called "the lessors "), demised to Messrs. F. W. Woolworth & Co., Ld. (hereinafter called " the lessees "), a shop known as Nos. 18 and 20, Commercial Road, Bournemouth, for a term of forty-two years at a rent of 3500*l.*, to be increased in 1945 to a higher figure.

The lease contained (par. 2 (v.)) a covenant by the lessees "not without the previous consent of the lessors to erect "or suffer to be erected any other building upon the said "demised premises nor to make or suffer to be made any "structural alterations in or additions to the demised "premises," with a proviso that "in the event of the lessees "making with the consent and approval of the lessors any further "additions, alterations," etc., " of the demised premises at any "time during the said term no fine or premium or increase of "rent will be demanded for such consent and approval."

The lease also contained covenants by the lessees : " From "time to time to well and substantially repair, cleanse, "maintain, amend and keep the demised premises and all "new buildings, structures and erections which may at any "time during the said term be erected on and all additions "which may be made to the demised premises and the land-"lords' fixtures thereon and all appurtenances thereof" ; and "to use occupy and preserve the demised premises open as "a first-class shop suited to the neighbourhood."

The lessees held on lease from a different owner, Commander Munro, a piece of land adjoining the said shop at the back thereof.

The lessees proposed to enlarge the demised shop by pulling down its back wall and connecting it with premises to be erected on the adjoining land, to which additional premises the staircases and lavatories and heating and ventilation appliances would be removed.

The lessors refused their consent to the proposed alterations except on payment by the lessees to them of 7000*l.* in respect of damage to or diminution in value of the demised shop.

The lessees refused to pay that sum, but made an offer to reinstate the demised shop in its original condition before the end of the term, and to take out a policy of insurance for the performance of that offer, and to pay expenses properly incurred. The lessors, however, declined that offer and still refused their consent to the alterations.

The lessees thereupon brought an action in the Chancery Division against the lessors asking for declarations that by reason of the Landlord and Tenant Act, 1927, s. 19, sub-s. 2 (1), the lessors were not entitled to withhold their consent to the making of the proposed alterations, and that the lessees were entitled to make the alterations without further request for consent, but subject to their paying to the lessors such sum as the Court should think reasonable.

On March 1, 1936, Clauson J. dismissed that action, and on July 29, 1936, the Court of Appeal dismissed an appeal against his decision, expressing the view, however (Greene L.J. dissenting), that the proposed alterations were "improve-"ments" within the meaning of the said sub-section. (2)

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(1) The sub-section is set out above in the headnote.

(2) See *Woolworth (F. W.) & Co., Ld.* v. *Lambert* [1937] Ch. 37.

In January, 1937, the lessees' solicitors applied to the lessors' solicitors for leave and licence to make substantially the same alterations as were the subject of the above mentioned action by the lessees, enclosing working plans, and making an offer to reinstate the premises in the condition in which they were before the proposed alterations were executed, and to give satisfactory security for doing so, and to pay expenses properly incurred in connection with such licence. The lessors, without naming any sum which they would demand as compensation, declined to give their consent.

In February, 1937, the lessors accordingly brought the present action in the Chancery Division against the lessees claiming a declaration that the alterations which they desired to make were not "improvements" within the meaning of s. 19, sub-s. 2, aforesaid, that such alterations if carried out would involve breaches of covenant by the lessees in their lease, and that if the lessors withheld their licence or consent to the proposed works such licence would not be unreasonably withheld within the meaning of the said sub-section.

The lessees pleaded that the alterations would be "improvements" within the meaning of the said sub-section to which the lessors were not entitled to withhold their consent, and counterclaimed declarations to that effect.

The action was tried by Simonds J. on April 27 and 28, May 11, and June 7, 1937. At the trial evidence was given on behalf of both parties, and (inter alia) on behalf of the plaintiffs as to their reasons for withholding their consent to the proposed alterations.

On the last mentioned date the learned judge gave judgment, holding in accordance with the opinion of the majority of the Court of Appeal on that point in *Woolworth* (*F. W.*) *& Co., Ld.* v. *Lambert* (ubi sup.) that the proposed alterations would be "improvements" within s. 19, sub-s. 2, but holding, further, that the lessors had not acted unreasonably in withholding their consent; and he, therefore, decided in favour of the lessors on their claim, and also on the counterclaim, which he dismissed except that he made a declaration that the proposed alterations were improvements within the said sub-section.

The lessors appealed, submitting that the proposed alterations were not improvements within the said sub-section, and that they could not be required to consent to them ; and the lessees cross-appealed, asking the Court for a declaration that the lessors had unreasonably withheld their consent.

Cyril Radcliffe K.C. and *Roger Turnbull* for the landlords, plaintiffs, appellants. The first question is whether or not the proposed alterations would be "improvements" within the meaning of the Landlord and Tenant Act, 1927, s. 19, sub-s. 2. (1) In the previous case between the same parties—namely, *Woolworth* (*F. W.*) *& Co., Ld.* v. *Lambert* (2) it was held by Clauson J. in the Court of first instance that the proposed alterations would not be "improvements" within the sub-section, and, although the Court of Appeal overruled his decision on that point, it did so only by a majority, consisting of Wright M.R. and Romer L.J., Greene L.J. dissenting, so that in that case the four judges concerned were equally divided in opinion on the point. In the present case Simonds J., the trial judge, took the view that on this point he was bound by the decision of the Court of Appeal in the former case and prevented thereby from expressing an independent opinion of his own upon the point. In these circumstances it is submitted that this Court is entitled to regard the point as one which is doubtful and free from authority. It is submitted that the alterations here proposed would not be improvements within the meaning of the sub-section. The true test whether an alteration is an improvement of that nature is that suggested by Greene L.J. in the previous case (3), namely, whether it is an improvement from the point of view of the landlord to the premises which are the subject-matter of the covenant, and not whether it is an improvement to some composite premises consisting partly of the demised premises and partly of other premises in which the landlord has no interest. Here the proposed alterations, far from being an improvement to the demised premises from the point of view of the landlord, would be a detriment to them. As to the test proposed by Lord Wright M.R. in the previous case (1) that " improvements " mean improvements from the point of view of the tenant, enabling him to get the most beneficial user of the demised premises even in conjunction with other premises, or the test proposed by Romer L.J. (2) that the alterations must render the tenant's occupation of the demised premises more convenient and comfortable to him, it is to be observed that there is nothing in the sub-section which gives any countenance to the view that an improvement is an alteration beneficial or convenient to the tenant for business or other purposes, and that the Part of the Act in which the sub-section occurs does not deal with the user of the premises by the tenant for business or other purposes. These tests disregard the true meaning of the word "improvements" as applicable to the demised premises, since they imply a partial destruction of these premises.

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(1) The sub-section is set out above in the headnote.

(2) [1937] Ch. 37.

(3) Ibid. 64 et seq.

The other question is whether or not the consent of the landlords to the suggested improvements was " unreasonably "withheld " within the meaning of the sub-section. Simonds J. rightly decided that their consent was not unreasonably withheld.

Sect. 19, sub-s. 2, of the Act of 1927 was copied from the former Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3, which is now re-enacted in the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 144, and cases under the older enactments decided that, if the landlord refused his consent except on some onerous condition such as the payment of an excessively large sum of money, then the tenant would be entitled to make the alteration without consent and free from the condition. And in the analogous case of a covenant by the tenant not to assign without the consent of the landlord, such consent not to be arbitrarily withheld, it was held in *Treloar* v. *Bigge* (3) that an arbitrary refusal would leave the tenant at liberty to assign without

(1) [1937] Ch. 49.
(2) Ibid. 55.
(3) (1874) L. R. 9 Ex. 151.

the landlord's consent. If, in the present case, when the tenants in January, 1937, applied for leave to make the alterations, the landlords had adopted any of these courses, then, no doubt, the tenants might be entitled to say that the consent was unreasonably withheld and that they could make the proposed alterations without obtaining the consent of the landlords or paying them anything. The landlords did not, however, act in any of these ways. They did not as a condition of granting their consent require payment of any excessively large sum of money, or, indeed, of any sum. Nor did they impose any other unduly onerous condition, or any condition. Neither do the landlords withhold their consent to the proposed alterations merely arbitrarily, in view of the very drastic and extensive character of these alterations. On the contrary, they are well entitled to withhold their consent on the ground that the proposed alterations are so extensive as to be unlawful. All things considered the consent of the landlords is not "unreasonably withheld" within the meaning of the sub-section. It may be said that the landlords should have proposed arbitration as a method of determining what would be a reasonable sum in respect of damage to the demised premises by the alterations; but there are reasons why the landlords should not take that course. By doing so they would in effect admit that the alterations were "improvements" within the sub-section. In such proceedings they would be prejudiced by the fact that on a former occasion they had mentioned a sum which might be taken as still representing the maximum compensation claimed by them. The sum awarded by an arbitrator might fall far short of the damage done by the alterations. On the whole it was not unreasonable on the part of the landlords to decline to go to arbitration, and they should not be forced to do so. The landlords have taken the proper course in bringing the present action asking the Court only for declarations to the effect that the proposed alterations would not be "improvements," and that their consent to these alterations is not unreasonably withheld. These contentions of the landlords on the appeal are in substance also their contentions on the

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cross-appeal. The action also involves questions as to the construction and effect of the covenants in the lease, and the landlords desire to keep these questions open in case of further proceedings.

Hon. Sir Stafford Cripps K.C., *Evershed K.C.*, and *S. P. J. Merlin*, for the tenants, defendants, respondents. The proposed alterations would be " improvements " within the meaning of the Landlord and Tenant Act, 1927, s. 19, sub-s. 2, as Simonds J. rightly held. The word " improvement " implies an alteration in the demised premises, and an alteration for the better. It appears from the provisions of the sub-section that the improvements which it contemplates are alterations for the better from the point of view not of the landlord but of the tenant. The sub-section states that the landlord may require as a condition of his consent to the making of the improvement the payment of a sum in respect of any damage to or diminution in the value of the premises; and it further states that in the case of an improvement which does not add to the letting value of the holding the landlord may require as a condition of his consent an undertaking by the tenant to reinstate the premises. These provisions plainly show that the " improvements " as seen by the landlord may not be alterations for the better inasmuch as they may cause damage to the premises of which he is the owner or diminish their letting value. It follows that the improvements referred to must be improvements in the view of the tenant, or in other words that the advantage of the tenant is the only criterion whether the alterations which he proposes are alterations for the better. That is the view which was taken by the majority of the Court of Appeal in the former case of *Woolworth (F. W.) & Co., Ld.* v. *Lambert* (1), Wright M.R. (2) and Romer L.J. (3) being there of opinion that " improvements " in the sub-section mean improvements from the point of view of the tenant, by which he gets a more beneficial user of the premises demised to him, possibly by using them in conjunction with other premises, and that they might still be improvements even though they would not improve or might even damage the demised premises from the point of view of the landlord, and only Greene L.J. (1), the dissentient member of the Court, thinking that the improvement must be an improvement confined to the premises demised by the landlord, and not an improvement deriving its character as such from its effect upon some composite building. The real objection of the landlords to the proposed improvements is that they will prevent the demised premises from remaining self-contained. That is not a valid objection. There is no provision in the sub-section or elsewhere which defines the nature or limits the extent of the alterations which may constitute improvements. If the proposed alterations are beneficial to the tenant, then they are improvements notwithstanding that they may be extensive in amount. It is submitted that they might even be so extensive as to involve taking down the demised premises and rebuilding them, either connected or not connected with other buildings on an adjoining site. Here they only involve making doors or openings in the back wall of the premises and the removal of the staircase and lavatory accommodation to the new premises. They do not involve the removal of the entire wall which can easily be re-built at any time so as to render the demised premises again self-contained. The view of the tenants that the alterations here proposed are improvements is supported by the decision in *Balls Brothers, Ld.* v. *Sinclair* (2) and the earlier cases there referred to. The repairing covenant in the lease, on its true construction, tends to support the view that the tenants are entitled to make the proposed improvements.

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(1) [1937] Ch. 37.
(2) Ibid. 49.
(3) Ibid. 55.

Secondly, the landlords unreasonably withheld their consent to the making of the proposed improvements, and Simonds J. was wrong in coming to the contrary conclusion. In construing the words in the sub-section that the landlord's "consent is not to be unreasonably withheld," regard should be had to the general principles of interpretation applicable

(1) [1937] Ch. 64.

(2) [1931] 2 Ch. 325.

to such an enactment, as set forth in *Heydon's Case* (1) and quoted by Scrutton L.J. in *Stumbles* v. *Whitley* (2) to the effect that there are four things to be considered, namely, what was the law before the making of the Act, what was the mischief for which the common law did not provide, what remedy has Parliament appointed, and what is the reason for the remedy. The evil which existed before this sub-section came into operation was that when a lease contained a covenant against making an alteration without consent, the landlord, as a condition of his not withholding his consent, might require the tenant to pay a large sum in respect of an alteration which might benefit the tenant and could not injure the landlord. The remedy which the sub-section introduced was to subject every such covenant to a proviso that the consent is not to be unreasonably withheld, subject to the right of the landlord to require compliance with certain conditions before giving his consent. The sub-section, having as its object to give relief to the tenant by enabling him to make alterations without the consent of the landlord, ought to be interpreted as in favour of the tenant and not of the landlord. The landlord may take one or other of three courses, namely, unconditionally withhold his consent, conditionally withhold his consent, or grant his consent. Here the landlords took the course of unconditionally withholding their consent, and the question is whether in so doing they "unreasonably withheld" their consent within the meaning of the sub-section. If the landlord unconditionally withholds his consent, the burden is on him of showing that it is not unreasonably withheld, and if he fails to discharge that burden his consent must be deemed to be unreasonably withheld. In order to discharge the burden of showing that his consent is not unreasonably withheld the landlord must show that it is withheld on some reasonable condition. The sub-section itself sets forth certain conditions of consent and thus indicates the kind of condition which may be regarded as reasonable for this purpose. It expressly provides that it

(1) (1584) 3 Co. Rep. 7 a.

(2) [1930] 1 K. B. 393, 397; s. c. [1930] A. C. 544.

does not preclude the right of the landlord to require as a condition of his consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the demised premises, and of any expenses properly incurred, nor in the case of an improvement which does not add to the letting value of the holding does it preclude the right to require as a condition an undertaking to reinstate the premises. Even if the landlords had imposed or were now to impose one or other of these conditions, they could not say that their consent was not unreasonably withheld because that condition had not been complied with by the tenants, inasmuch as the tenants in applying in January, 1937, for the landlords' consent to the alterations had already themselves offered to pay expenses and to reinstate the premises. If the landlords desire to impose any other condition upon the granting of their consent, they ought to specify it so that the Court may be able to judge of its merits. None of the reasons alleged by or on behalf of the landlords is sufficient to justify an unconditional withholding of their consent. The claim that they are entitled to withhold their consent until the Court has had an opportunity of finally deciding whether or not the proposed alterations are improvements makes their consent depend on a contingency beyond the control of the parties. The mere desire of the landlords that the demised premises should remain unaltered is no sufficient ground for an unconditional withholding of consent. Neither is their belief that the alterations might diminish the value of the premises from their point of view, inasmuch as they can make their consent conditional upon payment of a sum in respect of such loss. Neither is their disinclination to give a consent conditional upon the assessment of a sum of money to be paid by the tenants a sufficient excuse. An unconditional withholding of consent by the landlords is inconsistent with their former willingness to consent conditionally on payment of compensation. In the analogous case of a covenant in a lease not to assign the premises without the consent of the landlord, such consent not to be withheld unreasonably, it has been held that it is by reference to the personality of the

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tenant and the nature and user of the demised premises that the Court has to judge of the reasonableness of the landlord's refusal to consent, and it cannot take into account the fact that the landlord apprehends that the assignment will cause him some injury which may have no connection with the demised premises: *Houlder Brothers & Co.* v. *Gibbs* (1) and cases there referred to; and *Mills* v. *Cannon Brewery Co.* (2) Similarly in the case of a covenant not to make alterations without the consent of the landlord, the Court, in judging of the reasonableness of the landlord's refusal of consent, should have regard only to the tenant and the demised premises. In *Young* v. *Ashley Gardens Properties, Ld.* (3) it was held that, where a lease contained a covenant by the tenant not to assign without the licence of the landlord, such licence not to be unreasonably withheld, although the landlord is not bound to give any reason for his refusal, yet, if in granting the licence he attaches to it a condition which is unreasonable, the Court will in an action in that behalf make a declaration that the landlord is not entitled to impose the condition and that the tenant may assign without consent. The same course should be followed where the landlord, without assigning any reason, unconditionally withholds his consent. As to the cross-appeal, the tenants are fully justified in asking for a declaration that the consent of the landlords is unreasonably withheld, because they offered to take out a policy insuring the landlords against loss in case the tenants did not reinstate the premises before the end of the tenancy.

Cyril Radcliffe K.C. in reply. The consent of the landlord to alterations is not unreasonably withheld where the alterations are extensive and he objects to their being made; or where he desires that relevant questions of law should be settled before he gives his consent. The case of *Houlder Brothers & Co.* v. *Gibbs* (1) is no authority for saying that the withholding of consent in the present case is unreasonable, for there the proposal of the tenants was to assign the demised premises

(1) [1925] Ch. 198, affirmed Ibid. 575.

(2) [1920] 2 Ch. 38.

(3) [1903] 2 Ch. 112.

to persons in possession of adjoining premises belonging to the same landlords, whereas here the proposal is to connect the premises with adjoining premises not belonging to the landlords.

1938. May 11. The following judgments were read :—

GREER L.J. The appellants in this case brought an earlier action against the respondents asking for certain declarations. The case came on for hearing before Clauson J. (now Clauson L.J.), who decided, first, that the material placed before him did not enable him to say that the appellants, the plaintiffs in the action, had discharged the onus that lay upon them of proving that the defendants had unreasonably refused to grant a licence to the plaintiffs to make certain alterations in the premises which had been demised to them. The learned judge also held that the alterations which the defendants proposed to make in the demised premises were not improvements within the meaning of s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927.

There was an appeal from this decision which was heard by Lord Wright (then the Master of the Rolls), Romer L.J. (now Lord Romer) and Greene L.J. (now the Master of the Rolls). All the members of the Court agreed in holding that the onus was on the respondents to prove that the consent of the landlords had been unreasonably refused. There was no appeal from that decision to the House of Lords, and both parties in the present appeal are bound by the decision in the previous action though they may be entitled to question it by appeal to the House of Lords. It is in any event binding on us, and in so far as the relevant facts are the same in the present appeal, we must hold ourselves bound by their decision. The members of the Court were pressed to express an opinion upon the other branches of the case which had been fully argued, and though their views thereon were clearly not any part of the ratio decidendi of the Court, they did in fact express their opinions on these other questions, especially upon the question whether the alterations proposed by the defendants were improvements within the meaning of s. 19, sub-s. 2, of the statute.

If Clauson J. was right in his view that the proposed alterations were not improvements within the meaning of the section, no other question could arise for decision. I think it is clear that the Court of Appeal did not intend that their decision on this question as to the meaning of improvements should be part of the ratio decidendi of the case that was before them, but that their views upon this question were merely obiter given at the request of the parties in order to assist them in coming to a conclusion as to whether it was worth while to bring another action, but leaving it to either party to bring another action to have the point finally decided. The appellants then brought the present action. It is unnecessary for me to state in detail the facts so far as they relate to the vital question whether the respondents' proposals were improvements within the meaning of the section as the facts are fully set out in the judgments of the Court of Appeal in the previous case.

The present action was brought by the appellant landlords in order to obtain a declaration (inter alia) that the proposed alterations were not improvements either from the point of view of the defendants or the landlords. It came on before Simonds J., who came to the conclusion that he ought to follow the opinions expressed by the majority of the Court of Appeal, that is to say, by Lord Wright and by Lord Romer, in the previous appeal.

So far as this question is concerned, the relevant facts in the present action are similar to those proved in the first action. They are fully stated by all three Lords Justices in the previous appeal, and I need not repeat them. I find myself in agreement with the views expressed by Clauson J. (now Clauson L.J.) and by Greene L.J. (now Greene M.R.), on the question whether the suggested alterations were improvements within the meaning of s. 19, sub-s. 2, of the statute mentioned. I find it necessary to add but little to those reasons which in substance represent the conclusions I have myself arrived at. I think s. 19, sub-s. 2, must be read as meaning that the undertaking of the defendants was not to make any structural alterations in the demised premises in so far as they constituted improvements without the consent of the landlords, and that if the proposed alterations were not improvements, then the section does not provide that there should be implied by law any qualification of the tenants' undertaking not to make structural alterations in the demised premises.

The covenant into which it is argued the qualifications stated in s. 19, sub-s. 2, should be inserted is a covenant in reference to an alteration to the demised premises, and the words as to whether the proposed alterations are improvements must necessarily mean : " Can they be said to be improvements "in the demised premises." I think the fact that they make the business and the user of the tenants in the demised premises together with the increased accommodation that they obtained from other landlords better has nothing to do with the question whether the proposed alterations were improvements of the demised premises. I entirely agree with the view expressed by the Master of the Rolls on this subject, though I think it was unnecessary for him to admit, as he appears to have done, that the making of a doorway or other opening between the two different premises could be regarded as an improvement of the demised premises. I am inclined to think that if the doorway was merely made to provide an additional exit from the demised premises it might be considered an improvement, but if it was an opening made in order to join two premises held from different landlords it could not be regarded as an improvement of the demised premises. Apart from this I agree entirely with the reasoning of his judgment, and think it necessary to add very little to it.

I desire especially to point out, (1.) that the covenant to reinstate the premises applies only to their reinstatement at the end of the lease, that is to say, at a date in the year 1973 ; (2.) that in the meantime it would be impossible for the lessees either to sublet the demised premises as they are, or to sublet by itself the portion they had erected on

Commander Munro's property; (3.) they could only exercise their powers of subletting by subletting the whole of the property comprised in the two leases with the reasonable consent of their two landlords; (4.) it seems to me quite impossible to say that it was an improvement to the tenants' interests in the demised premises so to alter them as to make it impossible for them to use each of the floors for the benefit of their business by reason of the removal of the staircase, or that they could have secured any sub-lessee to take the demised premises unless he was willing and they were able to give him a sub-lease of both the appellants' building and the adjoining building which is on Commander Munro's land.

For these reasons, if the result of the appeal depended on my view, I should be prepared to grant the declaration which the appellants ask for, allow the appeal, and dismiss the cross-appeal, with the usual consequences.

SLESSER L.J. The facts of this case have been so often stated during the protracted litigation which has taken place between the parties that I do not think it necessary in any detail again to repeat them.

On the present appeal two questions arise—namely, whether the works desired to be carried out by the tenants are or are not improvements to the demised premises within the meaning of s. 19, sub-s. 2, of the Landlord and Tenant Act, 1927, and whether, if they be improvements, the withholding by the landlords of their licence or consent to the execution by the tenants of the works was or was not an unreasonable withholding within the meaning of the same sub-section.

The learned judge in this case has held that the works in question were improvements as above described, but further held that the plaintiffs had not acted unreasonably in withholding their licence and consent to the execution of the alterations. Both parties appeal; the plaintiffs contending that the works are not improvements, and that therefore the material section of the 1927 Act does not apply, the defendants by cross-appeal asking this Court to declare that the plaintiffs have unreasonably withheld their licence or consent.

The sub-section in question in its opening words speaks of leases containing a covenant against the making of improvements without licence or consent and to such leases only do its provisions apply. The instrument here to be considered does not in terms contain any covenant against the making of improvements without licence or consent, but does contain a covenant by the lessees that they will not without a previous consent in writing of the lessors erect or suffer to be erected any other building upon the said demised premises nor make or suffer to be made any structural alterations in or additions to the demised premises—there follow provisions as to alterations agreed before the lease on which no question arises—and then a proviso: " that in the event of the lessee "company making with the consent and approval of the "lessors any further additions alterations improvements to "or extensions of the demised premises at any time during "the said term no fine or premium or increase of rent will "be demanded for such consent and approval." This Court has already held that the sub-section refers to any covenant against alterations without licence or consent and that, if there is a clause in whatever terms and the proposed alterations are in fact capable of being deemed to be improvements, then the clause would apply: per Lord Wright M.R. in *F. W. Woolworth & Co., Ld.* v. *Lambert.* (1) So that, although the lease contains no direct reference to consent or a licence for improvements, the question here arises whether the proposed alterations are in fact capable of being deemed to be improvements. In this Court, in the case to which I have just referred, the majority were of opinion that they were so capable, but Greene L.J. was of the contrary opinion. In my view, when that case is carefully considered, although the opinions of the Court, of course, are of the greatest weight in determining the problem, the views on the question whether these works were improvements as expressed in that case were expressed obiter and were not part of the reasons for their decision, which was in favour of the defendants solely upon the ground that the plaintiffs had failed to prove that the defendants had unreasonably withheld their consent to the proposed alterations. Lord Wright, as appears from the transcript, on application for leave to appeal to the House of Lords in that case said: "The question of principle," i.e. on the point of what constitutes improvements, "which has "been discussed really has only been discussed by way of "observation. It may be that some other case will involve "an appeal to the House of Lords." Romer L.J. said (1): "it is sufficient to dispose of this case by saying, as Clauson J. "said, that the plaintiffs have not discharged the onus that "lay upon them of showing that the defendants had un-"reasonably withheld their consent." Greene L.J. speaks of the matter (2) as one that had been discussed in the case (2), and Lord Wright says, that the plaintiffs had failed to show that the licence had been unreasonably refused and that the appeal should be dismissed. (3)

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(1) [1937] Ch. 37, 49.

The matter is therefore open to us for our consideration, paying due regard, as I have said, to the observations of this Court in disapproving, by a majority, of the views of Clauson J. (4) from whom that appeal was brought, that the proposed alterations though they might benefit the plaintiffs, were not improvements of the demised premises and also the observations of the present Master of the Rolls to the contrary effect.

Although the 1927 Act contains no definition of the word "improvements" used in s. 19, sub-s. 2, yet that sub-section, if read as a whole, gives some indication of the meaning there to be ascribed to the word, for having enacted that in all leases containing a covenant against the making of improvements without licence or consent such covenant shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld, the sub-section goes on to say that this proviso shall not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value

(1) [1937] Ch. 60.
(2) Ibid. 62.
(3) [1937] Ch. 42.
(4) [1936] Ch. 415.

of the premises or any neighbouring premises belonging to the landlord, nor, in the case of an improvement which does not add to the letting value of the building, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises. From these words it follows that the section contemplates that an alteration may be an improvement although it produces damage or diminution in the value of the premises or does not add to the letting value of the holding, so that the mere fact of damage or diminution in the value arising to the premises from their alteration will not of itself necessarily prevent the alteration being an improvement. In other words (as the Court has, by a majority, I think, already decided), the question whether the alteration is an improvement must be regarded from the point of view of the tenant. This was the view taken by Luxmoore J. in *Balls Brothers, Ld.* v. *Sinclair* (1) following a decision of Rowlatt J. in *Lilley & Skinner, Ld.* v. *Crump.* (2) It is a view which, as I read their judgments, found favour with the majority of this Court on the last appeal, but if it be, as I think it is, open to us to consider the matter, I would say that I also have come to the conclusion that the question of improvement must be regarded from the point of view of the tenant. I also accept the view that it must be limited to an improvement of the demised property, for that and that only is the subject-matter of the whole sub-section which is dealing with the making of improvements of the demised premises.

Whether a proposed alteration of the demised premises is such an alteration as to destroy the subject-matter demised, is one question. Whether, when the alteration is one which can be made without destroying the subject-matter, it is to be taken as an improvement, is another. Thus, on the one hand, where what is demised is merely described as land, though there be buildings upon it, it may well be that under a licence to alter buildings a complete reconstruction might be permissible although it would have the result of destroying

(1) [1931] 2 Ch. 325. (2) (1929) 73 Sol. J. 366.

altogether the original building; where, on the other hand, the demised premises are described with great particularity, as might be the case, for example, in the case of a building with a defined number of floors, the removal of one floor altogether might be outside the scope of the powers given to alter the premises, in that what would be done would not be an alteration but a destruction of the subject-matter, but in this present case, on the facts, I do not think there can be any question but that the alterations here proposed are within the powers given under the lease. The premises are required to be used, occupied and preserved as a first-class shop or shops and there is power with the previous consent in writing of the landlords, as I have already stated, to erect or suffer to be erected, other buildings upon the demised premises and to make or suffer structural alterations in or additions to the demised premises. What is here proposed by way of reconstruction would in no wise prevent that part of the combined new premises which is on the land the subject of the demise from continuing to be a first-class shop, and all that is done in fact is to extend its area partly over land the subject-matter of the demise and partly over adjacent land not so demised.

I need not recite the very drastic alterations which are proposed, involving as they do the total removal of one of the walls of the existing shop, itself a combination of two earlier buildings, and other alterations such as the removal of the main staircase and lavatory accommodation in the existing shop and the considerable alteration of the drainage system. For myself, I share the inability expressed by Romer L.J. in the former appeal (1) to understand why, if a communicating door between the demised premises and other premises outside the area of the demise can be made and regarded as an improvement, as I think it can, the removal of a whole wall cannot similarly be so regarded if it adds to the total floor space; nor does it seem to me to make any difference on this head, where such removal is sought to be made in order to increase business amenity, whether a wall is removed to give access to premises to be built upon another part of the demised land or premises on another's land which is adjacent or to give open access to a highway. In all these cases, as Lord Wright points out (1), the shop might cease to be a self-contained shop, but so also would it be if archways or other communications other than the space produced by the removal of a whole wall were contemplated. In other words, paying particular regard to the fact that the sub-section contemplates in certain cases reinstatement, I see no reason why the whole wall should not be reinstated as readily as a more limited aperture. Greene L.J., the present Master of the Rolls, whose judgment I have very anxiously considered, says (2): that the matter is one of fact and degree in each case; the test he suggests is that the improvement must be an improvement to the premises which are the subject-matter of the covenant and not merely an improvement which derives its character as such from its effect and result upon some composite building. He goes on to say (2) that it may well be an improvement to make an opening from one set of premises into another for this reason, that the existence of that opening and the existence of that communication is a thing which improves the subject-matter of the covenant, namely, the demised premises, and does not derive its beneficial result merely from the fact that the tenant is the owner of some composite premises. He then goes on to point out (2) that the removal of the wall cannot be called such an improvement but says it is desirable, and desirable only, by reason of its effect upon the composite premises. With respect, I am unable to agree. The making of an opening, as of a door, in the demised premises, apart from a consideration of the adjacent land, seems to me no more and no less an improvement than the removal of the wall. If it is objectionable to consider the effect upon the combined premises in considering the case of the wall, so also is it in the case of a door; a wall may be a detriment, its removal an improvement—

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(1) [1937] Ch. 37, 56, 57.

"O wall," Thisbe laments, "full often hast thou heard my
"moans, For parting my fair Pyramus and me!"

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(1) [1937] Ch. 50.

(2) Ibid. 37, 64, 65.

In each case, the matter must be regarded, I agree, from the point of view of the demised premises as such. It is from that point of view that the tenant here contends that the user of the present shop, the demised premises, will be improved by access to a wider area; whether that wider area include contiguous premises or be an arcade or give better access to a highway, seems to me immaterial.

I follow, therefore, the views expressed by the majority of this Court in the recent appeal in this case and am of opinion that the alteration here required can properly be said to be an improvement, and think, therefore, that this lease, containing a covenant against the making of such alterations as constitute improvements without licence or consent must have imposed upon it the proviso and consequential conditions mentioned in s. 19, sub-s. 2.

I am of opinion that the learned judge was right when he decided that these proposed alterations were improvements and that consequently his declaration to that effect should not be disturbed and that the appeal fails.

The cross-appeal raises questions of difficulty. The facts in this matter are different from what they were in the first appeal. On that occasion the landlords demanded 7000*l.* in addition to the tenants' undertaking to reinstate as a condition of giving their licence; the plaintiffs, taking the view that, in return for a licence to carry out the work they should pay the lessors no more than a reasonable sum in respect of any damage to or diminution in the value of the premises, if any, such sum to be ascertained by the Court if not agreed. On May 13, 1935, the defendants thereupon refused their consent to the making of the improvements except on the footing of the payment by the plaintiffs to the defendants of the sum of 7000*l.*

In the present case, the facts are that on January 4, 1937, after the decision in the Court of Appeal, the tenants, by their solicitors, again applied for a licence from the landlord to make alterations which were with slight modifications those which had been proposed before and added: "Our clients are prepared as "a condition of such licence to execute a deed containing :—

"(1.) An undertaking to reinstate the said premises in the "condition in which they were before the proposed alterations "were executed; (2.) A provision for satisfactory security for "the performance of the said undertaking; (3.) An undertaking to pay all your clients' legal and other expenses "properly incurred in connection with such licence." It will be observed that, on this occasion, the tenants did not offer in addition, as they had formerly, to pay the landlords a reasonable sum in respect of any damage to or diminution of the value of the premises, any such sum to be ascertained by the Court if not agreed. On January 22, 1937, the solicitors for the landlords asked the solicitors for the tenants whether the tenants were claiming that the alterations were improvements within the meaning of the Landlord and Tenant Act, 1927, s. 19, sub-s. 2, and received a reply in the affirmative. Thereupon the landlords refused their consent. On this occasion they did not put forward any kind of proposal for the payment of a particular sum by way of compensation nor make any other proposal for the assessment of compensation by any tribunal. Simonds J. has held that the course which they took was to withhold consent, for that is what in his judgment their action amounted to, although they put it in the form of postponing their decision until the question, which they wished to have adjudicated upon, should be determined, if necessary by the highest tribunal, whether these proposed alterations were in fact improvements within the statute. I agree with his view of the effect of the landlords' action.

On this, the question now arises whether such licence or consent was or was not unreasonably withheld. This is a case to be regarded, in my view, as one of unqualified refusal. It is not a case where the landlords have sought to exercise their right, as stated in the statute, to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage or diminution in the value of the premises. Such a right might have been exercised either by asking for a particular sum or by saying that they would give their consent on the agreement by the tenant to pay what a tribunal might decide to be reasonable—following in this matter the same course as is expressly indicated in dealing with covenants against the alteration of the user of demised premises without consent in sub-s. 3 of the same section. Why the provision in that sub-section to the effect that "Where a dispute as to the reasonableness of any such "sum has been determined by a court of competent juris"diction, the landlord shall be bound to grant the licence or "consent on payment of the sum so determined to be reason"able" has not been adapted with suitable amendment to the different subject-matter in sub-s. 2, I do not know. But in any event, I cannot share the view that the landlords would have been in any peril if they had made some such condition of granting their consent as the tenants had themselves suggested on the first application when the landlords were demanding 7000*l.* However this may be, in the present case, as I have said, the landlords have unconditionally withheld their consent and made no condition as to payment of any compensation in respect of damage to or diminution in the value of the premises. Having so failed, they have abstained from claiming the benefit of sub-s. 2, which expressly preserves this right to them, nor in my view can they now be heard to say, as evidence of reasonableness, that the premises have suffered damage or any diminution in value and the tenant has not offered to compensate them. Prima facie, the proviso says that they shall not unreasonably withhold their licence or consent, but gives to them expressly a right to claim the payment of a reasonable sum in respect of damage or diminution in value. This they have not claimed; and I think therefore that they must seek for some other grounds of reasonableness for their refusal than those of damage or diminution in value to meet the case of the tenant against them.

I accept the view, which I think was unanimously expressed in this Court on the last appeal, that the onus of proving that the withholding is unreasonable is on the tenant, but if the landlord gives no reason but merely refuses, that, in itself, I think, puts upon him the duty of showing that his action was reasonable. The Act contemplates that the landlord may not in every case merely refuse to grant his licence without more, for the proviso which it imports into the lease does, I think, contemplate that he shall not act arbitrarily. In the case of covenants not to assign, it has been held that grounds of objection unconnected with the person of the assignee or the user or occupation of the premises are not reasonable: see *Houlder Bros.* v. *Gibbs* (1); a fortiori, if no grounds are given at all and none can be shown. In this case there is nothing to support a finding of absence of unreasonableness on which the landlords can rely. I agree with Mr. Radcliffe that many considerations, æsthetic, historic or even personal, may be relied upon as yielding reasonable grounds for refusing consent, which I do not think it necessary or possible here to catalogue. The wider the connotation given to the idea of improvement, the more necessary it may be that the landlord should have his protection. In the present general decline of taste and manners, a shop-keeper, looking at the matter from a purely commercial point of view, may be right in saying that the removal of some beautiful casement and the substitution of a garish window or façade of false marble may prove an attraction to the public and so, from his point of view, be an improvement. It is most important that the landlord should be able to be heard to say that it may be reasonable that he should withhold his consent to the perpetration of contemplated atrocities. In the present case, as the photographs show, no such considerations could possibly be urged. The erection of a kind of Assyrian façade, appropriate to and possibly copied from an archaic heathen temple, may or may not be in accordance with the spirit of the age; it is impossible to say that, architecturally, it can be regarded as any worse than the sordid front, of late Victorian architecture, for which it was substituted. In any case, Mr. Radcliffe makes no æsthetic appeal upon this head, nor does he suggest that any ancestral or other personal considerations arise. In any event the present frontage to the street had been agreed upon when Woolworths made their first alteration to the present premises,

(1) [1925] Ch. 198, affirmed in C. A. Ibid. 575.

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and it is only the extension at the back on to a confused area of garages, yards and sheds, which is affected. In this case the only possible reason which the landlord might have for refusing consent is in relation to the damage or diminution to the value of the reversion of their premises. For this, the section provides a right of claim of which they have not thought fit to avail themselves.

In the result, I have come to the conclusion that the tenants have discharged the onus upon them of proving that the consent in this case has been unreasonably withheld and that consequently the cross-appeal should be allowed and a declaration made to that effect.

MacKinnon L.J. The dispute between these parties has already been before another division of this Court, when it unfortunately gave rise to a difference of opinion. Its reappearance before us is avowedly only a stage on the journey to the House of Lords. It is unnecessary for me to recount the facts.

The Landlord and Tenant Act, 1927, is described in its title as having two objects. The second of them is alone material in this case, namely, " to amend the law of landlord "and tenant." Sect. 19, sub-s. 2, enacts that any covenant in a lease against the making of improvements without the landlord's consent shall be deemed to be subject to a proviso that such consent is not to be unreasonably withheld. It was long ago said by the great Coke that where a statute is passed to amend the common law, it is the duty of a judge to see what was the mischief for which the common law did not provide, and what remedy for that mischief Parliament has resolved on. Knowing these two things, the office of the judge is to make such construction of the statute as shall suppress the mischief and advance the remedy, and defeat subtle inventions and evasions for the continuance of the mischief. The mischief aimed at by this s. 19, sub-s. 2, is obviously the power of the landlord to exact arbitrary payment—not to use a harsher word—from a tenant as the price of his consent. The remedy is the enforced addition to the covenant that consent is not to be unreasonably withheld. If the section were read very strictly, it would add the proviso only to a covenant that the lessee shall not make "improvements" without the lessor's consent. But no one has ever seen a covenant in such terms. Clearly it must refer to the common type of covenant not to make alterations in or additions to the demised premises. But the section contemplates alterations or additions that are "improvements." I think this means alterations or additions which are regarded by the tenants as improvements, and are desired as such by him, and that it is not necessary that they should be improvements from the point of view of even the most altruistic landlord. This seems a necessary inference from the fact that the section contemplates that the "improvement" may cause damage to, or diminution in the value of, the premises, and provides for compensation to the landlord for such damage or diminution. I think Luxmoore J. was right when, in another case about this section, he said: "the question "whether it is an improvement or not may be considered from "the point of view of the tenant alone." (*Balls Brothers, Ld.* v. *Sinclair*). (1)

The lease of February 27, 1931, has among the lessees' covenants a clause, 2 (v.)—"Not without the previous consent "of the lessors . . . . to make or suffer to be made any "structural alterations in or additions to the demised premises "etc." This is clearly within s. 19, sub-s. 2, of the Act "a "covenant against the making of improvements without "licence or consent." The Act, therefore, requires that in the lease a proviso must be deemed to be added to the covenant that such consent is not to be unreasonably withheld.

In so far as the alterations desired by the lessees, which are therefore "improvements," are only alterations inside the demised premises, that is to say, the removal of the stairs that give access to the back part of the shop, the only question would be whether the plaintiffs have unreasonably withheld their consent to that alteration. But a further question arises from the fact that the defendants desire to pull down the back wall of the demised premises so as to

(1) [1931] 2 Ch. 325, 331.

unite them with the new building they propose to erect on the land behind which they have leased from Commander Munro. It is said that, as these " improvements " are not confined to alterations of the demised premises, the part of them that affects the demised premises cannot be regarded as improvements of those premises. This was the point on which, in the previous action, there was a difference of opinion between Lord Wright M.R. and Romer L.J. on the one side and Greene L.J. on the other. I agree with the view of Lord Wright M.R. and Romer L.J. If the tenant of demised premises has bought or leased adjacent land, and desires to get access to that land by making a doorway or opening through the wall of the demised premises, I think he can clearly assert that such an opening, even if it be pro tanto a destruction of part of the demised premises, is an alteration which is to be regarded as an " improvement " under the section of the Act. If that be so, what is here proposed is an alteration of the same kind, though it differs very much in degree. But if an alteration of a certain kind can be an " improvement " I do not think it ceases to be so if it happens to be a very big alteration of that kind.

In the result I think that the works which the defendants propose to carry out are improvements within the meaning of the section, that they are alterations within the covenant in the lease, and that, by reason of the Act, the words : " such "consent not to be unreasonably withheld " have to be taken as added to the covenant.

The defendants by their solicitor's letter of January 4, 1937, gave to the plaintiffs full particulars of the alterations which they desire to make, and asked for the licence of the plaintiffs to make them. The plaintiffs have failed to give such licence or consent. The only question that remains is whether such consent has been unreasonably withheld.

Leaving aside the statute for the moment, if there is a covenant in a lease " not to make structural alterations "without consent, such consent not to be unreasonably with-"held," and the tenant asks for consent to do certain works, the landlord might justify his refusal to consent on various grounds. (1.) He might object on æsthetic, artistic, or sentimental grounds. (2.) He might object that the alterations would damage the demised premises or diminish their value. (3.) He might, perhaps, object that the alteration would damage his neighbouring premises, or diminish their value. I say "perhaps," as to this, having in mind the possible effect of the principle of *Houlder* v. *Gibbs*. (1) (4.) He might object that, as the alteration would not add to the letting value of the premises, he would have to undo it and reinstate the old conditions at the end of the term.

Of these (1.) I believe and hope remains unaffected by anything in the Act of 1927. No Court, as I hope and believe, will ever hold that under s. 19, sub-s. 2, a landlord must consent to the hideous degradation of the front of his building by a sheet of plate glass, and be satisfied by a money payment for the loss of graceful eighteenth century windows. But a glance at the photograph of these premises shows that no æsthetic considerations can be involved in this case. If we had no photograph, that might be inferred from the address—"Nos. 18 and 20, Commercial Road, Bournemouth."

As regards the other grounds (2.) to (4.), the section makes express provision. The landlord must not unreasonably withhold his consent, "but this proviso does not preclude "the right to require as a condition of such consent the "payment of a reasonable sum in respect of any damage "to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any "legal or other expenses properly incurred in connection "with such consent, nor, in the case of an improvement which "does not add to the letting value of the holding, does it "preclude the right to require . . . . an undertaking on the "part of the tenant to reinstate the premises in the condition "in which they were before the improvement was executed."

Anticipating the right of the plaintiffs to make such requirements, the defendants' solicitors in their letter of January 4, 1937, wrote: "Our clients are prepared as a "condition of such licence to execute a deed containing:—

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(1) [1925] Ch. 575.

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"(1.) An undertaking to reinstate the said premises in the "condition in which they were before the proposed alterations "were executed. (2.) A provision for satisfactory security "for the performance of the said undertaking. (3.) An under-"taking to pay all your clients' legal and other expenses "properly incurred in connection with such licence." The provision for security for performance of the undertaking to reinstate was in fact a policy of the Alliance Assurance Company. It is admitted that, so far as it is humanly possible to guarantee the due performance of building works in Bournemouth in February, 1973, the undertaking cannot be more satisfactorily secured. Of the conditions which the landlord has a right to require there therefore remains only one—namely, the payment of " a reasonable sum in respect "of any damage to or diminution in the value of the demised "premises," for there has been no suggestion of any damage to or diminution in the value of any neighbouring premises belonging to the plaintiffs, or that any do belong to them. Having regard to what I have said it follows that in my view, upon receipt of the letter of January 4, 1937, the plaintiffs were obliged by the section to give their consent subject only to a requirement that the defendants should pay them a reasonable sum in respect of any damage to or diminution in the value of the demised premises by reason of the alterations. The plaintiffs have given no consent. It follows that prima facie they have unreasonably withheld their consent.

Simonds J. held that they had not unreasonably withheld consent. He came to that conclusion on the ground that the plaintiffs, if desirous of requiring the payment of a reasonable sum, must quantify the amount they required, and if it should thereafter be held that they had named too large a sum they would be held to have acted unreasonably, and the defendants need pay them nothing. In view of this hazard he thought that the plaintiffs did not act unreasonably in not consenting at all.

I cannot accept this reasoning. In the first place it would render the operation of the Act wholly nugatory in every case in which the amount claimable by the landlord is uncertain. This seems to be an invention or evasion for the continuance of the mischief which the statute was designed to remedy. Secondly, I see no reason why the plaintiffs need have specified the sum they demanded. They could in perfect compliance with the Act have replied to the letter: "We "give our consent provided you pay us a reasonable sum for "damage to or diminution in the value of the premises. We "are advised that such sum should be £X, but if you do not "agree with that estimate the difference between us must "be settled by some competent tribunal." Such a dispute, merely as to the quantum of an admitted liability, may commonly arise, for example, under s. 8 of the Sale of Goods Act, 1893.

But, thirdly, I entirely dissent from the view that if the plaintiffs had named the sum which they considered to be reasonable, and it was subsequently held to be too much, the Court would hold that they had unreasonably withheld their consent. It is true that if a lessor attaches to his consent a condition that the Court thinks is unreasonable, it may make a declaration that the lessee may act without any further consent of the lessor: *Young* v. *Ashley Gardens Properties, Ld.* (1) If in answer to the letter of January 4, 1937, the plaintiffs had said: "We give our consent provided "you pay us £X and we will not take a penny less," that result might follow when £X was found to be too much. But it would not follow if they said: "We give our consent "provided you pay a reasonable sum, and we are advised "and consider that £X is such a sum."

This view, I think, is impliedly supported by the previous decision of this Court. The plaintiffs (then the defendants) were held not to have unreasonably withheld their consent when they coupled with it a request for 7000*l.*, the sum which their expert witness estimated to be proper. But the Court did not go on to say that they agreed with that expert and found that 7000*l.* was the proper sum. Seeing that an equally competent witness for the defendants (then the plaintiffs) said that the proper sum was *nil*, it is not surprising

(1) [1903] 2 Ch. 112.

that the Court appears to have been unable to arrive at any finding as to the proper amount. But I am only concerned to point out that it was held that the present plaintiffs had not unreasonably withheld their consent though they asked for a sum which was not shown to be the reasonable sum they were in fact entitled to demand.

It results in my view that the ground on which Simonds J. held that the plaintiffs did not unreasonably withhold their consent is fallacious.

The request for the consent in the defendants' solicitor's letter of January 4, 1937, was never replied to. The only real answer to it was the plaintiffs' solicitor's letter of February 10, 1937, saying that they proposed by the present litigation to settle all doubts as to the construction of the statute before deciding whether to give or withhold consent. I do not think this is any justification for not giving consent. Ignoratio legis neminem excusat—not even if it is an uncertainty as to the meaning of a statute which has caused Lords Justices to differ.

In the result I think the plaintiffs have unreasonably withheld their consent, and the defendants are entitled to carry out the proposed works without it. The plaintiffs may have been in some difficulty. But I confess I do not feel much sympathy for them. The defendants as long ago as August 11, 1936, offered to submit the question of the amount to be paid by them to arbitration. That was a proposal which I think reasonable people would have accepted. I cannot help having a suspicion, which I hope is ill-founded, that the subsequent lengthy and dilatory correspondence may have been subtle inventions and evasions for the continuance of the mischief sought to be remedied by the statute.

I am therefore of opinion that in this action there should be judgment for the defendants upon the claim with costs, and upon the counterclaim judgment for the defendants with costs for the three declarations asked for.

Greer L.J. The effect of the judgment of the majority of the Court is that the appeal is dismissed with costs, the cross-appeal allowed with costs, both parties having leave to go to the House of Lords.

Appeal dismissed. Cross-appeal allowed.

Solicitors for appellants: *Robins, Hay & Waters.*
Solicitors for respondents: *Lovell, White & King.*
Solicitors for an interested party: *Seaton, Taylor & Co.*

J. R.

FARWELL
J.

1938
Mar. 18, 31:
May 25.

In re HODSON'S SETTLEMENT.

BROOKES *v.* ATTORNEY-GENERAL.

[1937. H. No. 3424.]

Revenue—Estate duty—Settled property—Accumulations—Aggregation with other property—Interest arising on death of settlor—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1, *s.* 2, *sub-s.* 1 (*d*), *s.* 4.

By a deed dated May 20, 1925, H. appointed himself and B. trustees of a fund consisting of 20,000 1*l.* fully paid ordinary shares in W. B. & Co., Ld. This was styled the "Trust Fund," whereout a clear sum of 1200*l.* was to be paid to G. S. every year during her life, and any residue was to form an "Accumulation Fund." Any deficiency in the "Trust Fund" was to be made up from the capital and/or income of the "Accumulation Fund." After the death of H. the income of the accumulations was to be paid to G. S. for her life, and there were trusts for her issue after her death, but the surplus income of the "Trust Fund" during the rest of the life of G. S. remained undisposed of, an omission which was remedied by a further settlement dated December 7, 1931. The settlor, H., died and the questions arose (1.) whether estate duty was payable on the accumulations under the Finance Act, s. 1, or under s. 2, sub-s. 1 (*d*) (1); and (2.) whether the accumulations were an interest which should be aggregated under s. 4 of the Act with the other property of H.:—

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(1) Finance Act, 1894, s. 1, provides: "In the case of every "person dying after the commencement of this Part of this "Act, there shall, save as hereinafter expressly provided, be "levied and paid, upon the principal value ascertained as hereinafter provided of all property, "real or personal, settled or not "settled, which passes on the "death of such person a duty, "called 'Estate duty,' at the "graduated rates hereinafter mentioned. . . . . ."

Sect. 2, sub-s. 1, provides that: "Property passing on the death of "the deceased shall be deemed "to include the property following, that is to say:—(*a*) Property of which the deceased "was at the time of his death competent to dispose; (*b*) Property "in which the deceased or any "other person had an interest "ceasing on the death of the "deceased, to the extent to which "a benefit accrues or arises by the "cesser of such interest; but "exclusive of property the interest "in which of the deceased or other "person was only an interest as "holder of an office, or recipient "of the benefits of a charity, or "as a corporation sole."

. . . .

Sub-s. 1 (*d*) provides: "Any "annuity or other interest purchased or provided by the "deceased, either by himself alone "or in concert or by arrangement "with any other person, to the "extent of the beneficial interest "accruing or arising by survivorship or otherwise on the death "of the deceased."

Held, on the first question: that the accumulations as a whole did not pass on the death of the settlor and estate duty was not payable under s. 1 but under s. 2, sub-s. 1 (*d*).

Held, on the second question: that the property which was deemed to pass was not property in which the settlor ever had an interest and was not, therefore, to be aggregated with his other estate.

Adamson v. *Attorney-General* [1933] A. C. 257 and *Attorney-General* v. *Lloyds Bank, Ld.* (1934) 151 L. T. 268 (affirmed [1935] A. C. 382) discussed.

ADJOURNED SUMMONS.

The facts as stated by Farwell J. were as follows:—

Prior to May 20, 1925, Laurence William Hodson was absolutely entitled to 20,000 1*l.* fully paid ordinary shares in a company known as W. Butler & Company, Ld. He transferred those shares into the names of himself and another as trustees to be held by them upon the trusts declared by a settlement of May 20, 1925. That settlement was made between the settlor and Thomas Cannon Brookes, and provided that the trustees should stand possessed of the 20,000 1*l.* fully paid ordinary shares in W. Butler & Company, Ld., and the investments for the time being representing the same which were defined as "the "trust fund," upon the following trusts, that is to say, the trustees were out of the income of the trust fund if and so far as sufficient for the purpose to pay such a sum in every year as after the deduction of income tax for the time being in respect thereof would leave a clear sum of 1200*l.*, such sum to be paid to Grace Stuart therein mentioned during her life subject to forfeiture as therein mentioned. Secondly, that during the joint lives of the settlor and the said Grace Stuart the residue of the income should be accumulated by investing the same and the resulting income thereof and the trustees should stand possessed of such investments and the investments for the time being representing the same which were called " the accumulations fund " and the annual income thereof upon the following trust: " If and whenever during "the life of the said Grace Stuart the annual income of the "trust fund shall be insufficient to provide such a sum as "after the deduction of the income tax for the time being

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Brookes *v.* Attorney-General.

"payable in respect thereof will leave a clear sum of 1200*l.* "the trustees shall make good such deficiency out of the "capital or income of the accumulations funds as they may "think fit." Then it was provided that after the death of the settlor if the said Grace Stuart should survive him, subject to the immediately preceding trust and forfeiture the trustees were to pay the annual income of the accumulations fund to Grace Stuart during the residue of her life, and: " After "the death of the said Grace Stuart the trustees shall hold the "capital and income of the trust fund and of the accumulations "fund or so much thereof respectively as shall not have been "paid or applied under any trust or power affecting the "same: (1.) In trust for all or such one or more exclusively "of the others or other of the issue of the said Grace Stuart "whether children or remoter issue at such time and if more "than one in such shares and with such gifts over and such "provisions for maintenance advancement and otherwise at "the discretion of any person or persons and generally in "such manner for the benefit of such issue or some or one of "them as the said Grace Stuart shall by deed revocable or "irrevocable or by will or codicil appoint." Then: " And in "default of and until and subject to any such appointment in "trust for all or any the children or child of the said Grace "Stuart who attain the age of twenty-one years or being female "marry under that age and if more than one as tenants in "common in equal shares, subject to the provisions with "regard to hotchpot therein contained."

The effect of that settlement was to dispose of the whole of the beneficial interest of the settlor in those investments with the exception of surplus income (if any) of the trust fund. Under the settlement Grace Stuart took an annual income of 1200*l.* during her life, and that payment was to be continued both during the joint lives of herself and the settlor and after the death of the settlor during her life. On the death of the settlor the trust for accumulations came to an end and thereupon Grace Stuart became entitled under the settlement to the income from the accumulations fund, but there was no disposition by this settlement of the surplus income of the trust fund itself after the annual payment had been made to Grace Stuart, and in order to fill up that omission in the settlement there was a supplementary settlement dated December 7, 1931, made between the settlor of the first part and the trustees of the second part, which provided (inter alia) that the trustees should stand possessed of the residue of the annual income of the trust fund during the life of the said Grace Stuart after the death of the settlor on trust to pay the annual income to the trustee Mr. Brookes absolutely. The effect of those two settlements combined was to divest the settlor of the whole of his beneficial interest in the investments settled with the result that for all time after that settlement he ceased to have any interest except as one of the trustees in the investments.

The settlor died on March 3, 1933. At his death the fund still consisted of the 20,000 ordinary shares in W. Butler & Company, Ld. The first question in the summons was: "Whether upon the true construction of the said settlement "and of the Finance Act, 1894, and Amending Acts, and in "the events which have happened, the estate duty payable upon "the death of the said Laurence William Hodson (hereinafter "called 'the deceased') in respect of the accumulations fund "in the said settlement defined is payable under sect. 1 of the "Finance Act, 1894, on the principal value of the said "accumulations fund at the death of the deceased, or under "s. 2, sub-s. 1 (*d*), of the said Act on the amount of the difference "between the value of the interest of Grace Stuart in the said "accumulations fund under the said settlement immediately "after the death of the deceased and the value of her interest "in the said accumulations fund under the said settlement "immediately before the death of the deceased."

Cyril Radcliffe K.C. and *B. F. Mendel* for the plaintiff. This case concerns the estate duty leviable under the Finance Act of 1894. The relevant sections are s. 1, s. 2, sub-s. 1 (*d*), and s. 4. The summons first asks whether the duty is payable under s. 1 or under s. 2, sub-s. 1 (*d*). In my submission it is not payable under s. 1. The property does not pass to the executors of the settlor: a beneficial interest is not sufficient to cause the property to pass and the case falls within the principle of *Adamson* v. *Attorney-General* (1) and *Attorney-General* v. *Lloyds Bank, Ld.* (2), a decision of the Court of Appeal affirmed by the House of Lords: the turning of a contingent interest into a vested interest does not make property pass on death.

J. H. Stamp for the Attorney-General. My friend's argument depends on *Attorney-General* v. *Lloyds Bank, Ld.* (2) On principle there is here a clear case of property passing. Immediately before the death of the testator there was a fund of accumulations of income and there was a class interested in it. There was a contingent life interest and an absolute interest in the tenant for life. I submit that this property passed as a whole. The tenant for life had a contingent interest before the property passed as tenant for life and there was no new trust or disposition. He referred to *Burrell* v. *Attorney-General* (3) in support of the contention that s. 1 of the Finance Act, 1894, was applicable.

Cur. adv. vult.

1938. Mar. 31. FARWELL J. [After reciting the facts continued:] If this settlement had made no provision for the payment of any annual sums but had directed that the income should be held upon trust to accumulate during the life of the settlor and after his death as to both capital and income and accumulations upon trust for the children or issue of Grace Stuart as she should appoint and in default of appointment for the children who attained twenty-one or being daughters married under that age, the children of Grace Stuart as and when they attained twenty-one or being daughters married under that age would have taken vested interests in the whole fund subject to being divested by a valid exercise of the power of appointment, and this case in my judgment would have come precisely within the decision of the House of Lords in *Adamson* v. *Attorney-General* (1), and accordingly it would have followed from that decision that no duty was payable under s. 1 but that duty was payable under s. 2, sub-s. 1 (*b*). In this case, however, interests for life have been created. There is the interest of Grace Stuart both in the annual sum of 1200*l.* a year and after the death of the settlor in the income of the accumulations fund. There is also the interest given to the trustee Mr. Brookes after the death of the settlor in any surplus income of the trust fund, and the question therefore is whether the interposition of these interests take the case out of the decision in *Adamson* v. *Attorney-General.* (1) That question is one which, in my judgment, has been answered for me by the Court of Appeal in the case of *Attorney-General* v. *Lloyds Bank, Ld.* (2) As I understand that judgment, the interposition of life interests is not in itself sufficient to take the case out of the decision in *Adamson* v. *Attorney-General* (1) and Romer L.J., as he then was, states that quite plainly in his judgment. If the matter rested there, there would be, so far as I am concerned, an end of the matter, because, in my judgment, apart from the life interests there can be no question that *Adamson* v. *Attorney-General* (1) applies, and according to the decision of the Court of Appeal the interposition of interests for life does not take the case out of the principle of the decision in the House of Lords.

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(1) [1933] A. C. 257.
(2) (1934) 151 L. T. 268; [1935] A. C. 382.
(3) [1937] A. C. 286.

I have, however, been invited on behalf of the defendant to say that the decision of the Court of Appeal is not binding upon me and that I should decide this case irrespective of that decision. That contention is based on two grounds. It is said, firstly, that the decision of the Court of Appeal was impliedly overruled by the House of Lords, alternatively it is said that even if it was not impliedly overruled it was a decision on a purely hypothetical case and the judgment, therefore, must be treated as obiter dicta and not as constituting a decision which I ought to follow. What happened in that case was this: There was a settlement by which the income was to be accumulated during the life of the settlor, and after his death the property was to be

(1) [1933] A. C. 257.
(2) 151 L. T. 268; [1935] A. C. 382.

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held on trust for certain named persons with a direction that the shares should be settled so that each of the named persons took life interests only with remainders over. The question arose with regard to the incidence of estate duty. The matter came before the Court of Appeal who construed the settlement as giving the named persons life interests only with remainders over, and it therefore became necessary for the court to determine whether the interposition of interests for life was sufficient to take the case out of the decision of the House of Lords in *Adamson* v. *Attorney-General.* (1) They came to the conclusion that it was not sufficient and that the case was governed by *Adamson* v. *Attorney-General* (1) and that accordingly no estate duty was payable under this sub-section of the act. That case went to the House of Lords and the decision of the Court of Appeal was affirmed, but the House of Lords took a different view as to the construction of the settlement. They held that on the principle of *Lassence* v. *Tierney* (2) and *Hancock* v. *Watson* (3) the named persons took absolute interests, and that the decision in the House of Lords in *Adamson* v. *Attorney-General* (1) applied. It was, in the view which they took of the true construction of the settlement, unnecessary for them to consider the question which the Court of Appeal had considered and decided as to the effect of the interposition of life interests. That was a matter which they had not to consider, and they did not consider it, but I cannot find in the decision in the House of Lords anything which can be said to amount to an express disapproval or reversal of the decision of the Court of Appeal; it was unnecessary for the House to consider it, and they did not consider it, but I cannot treat the decision in the House of Lords as overruling or reversing the decision of the Court of Appeal.

With regard to the other ground upon which it was put, no doubt it is true to say that the question which the Court of Appeal considered and determined was a question which in the view which the House of Lords took of the true construction of the settlement did not arise, and in that sense was a

(1) [1933] A. C. 257.

(2) (1849) 1 Mac. & G. 551.

(3) [1902] A. C. 14.

hypothetical question, but it seems to me that it would not be proper for me, sitting in a Court of first instance, to disregard the decision of the Court of Appeal. If the decision of the Court of Appeal is not to be treated as a binding decision, or one to be followed in the Courts, I think that it is for the Court of Appeal itself to say so. So far as I am concerned, I have here a decision of the Court of Appeal which in my view decides the problem which I am asked to decide, and I think that I ought to follow it without expressing any view of my own. Under those circumstances it seems to me I must decide, on that authority, that this case is within the principle of the decision in *Adamson* v. *Attorney-General* (1) and accordingly the property as a whole did not pass on the death of the settlor, and the estate duty is not payable under s. 1 but is payable under s. 2, sub-s. (1) (*d*), and I will make a declaration accordingly.

1938. May 25.

The second question asked in the summons was: "Whether, "for the purpose of ascertaining the rate of Estate Duty "payable on property passing on the death of the deceased, "the said accumulations fund at the death of the deceased, "or the amount of the said difference mentioned in para-"graph (1.) hereof, or any other sum in respect of the said "accumulations fund, ought to be aggregated so as to form "one estate with the property or other property which passed "on the death of the deceased, or ought to be treated as an "estate by itself."

Cyril Radcliffe K.C. and *B. F. Mendel* for the plaintiff. The settlor had no beneficial interest in the fund or future interest accruing thereon and the accumulations are not aggregable. The judgment of Lawrence J. in *Attorney-General* v. *Dickinson and Baron* (2) was referred to.

J. H. Stamp for the Attorney-General. How could the deceased provide a fund unless he had had an interest in it? If there is a settlement and it fails, there is a resulting trust in favour of the settlor.

(1) [1933] A. C. 257.

(2) [1937] 2 K. B. 574.

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FARWELL J. This is, in my view, a question of some difficulty which arises out of the decision which I gave in this same matter a short time ago upon s. 1 of the Finance Act, 1894. It is not necessary for me, having regard to that decision, to state the facts again. The effect of the decision was that the property in question did not pass under s. 1 but did pass under s. 2, sub-s. 1 (*d*), of the Act of 1894. That section, so far as it is relevant for this matter, is in these terms: "Property passing "on the death of the deceased shall be deemed to include the "property following, that is to say"; .... (*d*) "Any annuity or "other interest purchased or provided by the deceased, either "by himself alone or in concert or by arrangement with any "other person, to the extent of the beneficial interest accruing "or arising by survivorship or otherwise on the death of the "deceased." It is, I think, important to notice that the property which is deemed to pass under sub-s. 2 (*d*) is not the annuity or other interest purchased or provided by the deceased except to the extent of the beneficial interest accruing or arising by survivorship; it is not therefore, strictly speaking, property except in the sense that it is a beneficial interest which accrues by reason of the death of the person in question.

That being so, the question which I have to determine is whether such an interest which is deemed to pass on the death is property which must be aggregated under s. 4 which provides: "For determining the rate of Estate duty to be paid "on any property passing on the death of the deceased, all "property so passing in respect of which Estate duty is leviable "shall be aggregated so as to form one estate, and the duty "shall be levied at the proper graduated rate on the principal "value thereof: Provided that any property so passing, in "which the deceased never had an interest, or which under a "disposition not made by the deceased passes immediately on "the death of the deceased to some person other than the wife "or husband or a lineal ancestor or lineal descendant of the "deceased, shall not be aggregated with any other property "but shall be an estate by itself, and the Estate duty shall be "levied at the proper graduated rate on the principal value "thereof." The question is whether this particular property

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which is deemed to pass on the death of the deceased is property in which the deceased had an interest.

I have been referred to certain authorities, but, in my judgment, this particular question has not been the subject-matter of a decision which binds me. So far as I can see, this particular question was not decided by the House of Lords in the case of *Adamson* v. *Attorney-General.* (1) I am unable to find anything which indicates that the matter was considered in that case, and, in my judgment, the declaration which Lord Warrington formulated in his speech and which was the declaration which was ultimately made does not cover the precise point which I have to determine.

The matter has been considered and is the subject-matter of a decision by Lawrence J. in the case of *Attorney-General* v. *Dickinson and Baron.* (2) In that case it was admitted by counsel for the defendants that the property was property which passed under s. 1 of the Finance Act, and Lawrence J. in giving a considered judgment (2) was careful to say: "It was "admitted by Mr. Fergus Morton on behalf of the defendants "that these accumulations of income were property passing "on the death of the deceased within the meaning of s. 1, "and I decide the case upon the footing of that admission."

The fact that the learned judge decided the question on that footing differentiates that case from the present one. While that decision may well have been a perfectly correct decision having regard to the admission, if the admission had not been made, and the learned judge had come to the conclusion that it was not a case which came within s. 1 but, as in the present case, within s. 2, sub-s. 1 (*d*), different considerations would have arisen, and I should have had the benefit of the learned judge's view upon the matter.

The other case in which the question has been considered is the case of *Attorney-General* v. *Lloyds Bank, Ld.* (3) In that case the question of aggregation does not seem to have been referred to at all until the very end of the case. After the learned judge, Finlay J., had decided that the property did not

(1) [1933] A. C. 257.

(2) [1937] 2 K. B. 574, 579.

(3) 151 L. T. 268.

pass under s. 1, but did pass under s. 2, sub-s. 1 (*d*), he was asked to say whether it ought to be aggregated or not under s. 4. It appears from what followed that the learned Attorney-General was taken by surprise as to this question, and he gave up the point. He said: "I do not feel in a position to say that "the deceased ever had an interest in the accumulations." On that the learned judge made a declaration accordingly. When the matter was before the Court of Appeal on the other point the Crown, in the face of the admission by the Attorney-General in the court below, did not take the point. Under these circumstances I think that I am bound to form my own opinion on the matter and I propose to approach the question on the footing that there is no authority binding on me.

The question is a short one, although by no means an easy one. The question is whether this particular property was a property in which the deceased had an interest. It has been argued strenuously on behalf of the Crown that the deceased undoubtedly had an interest in this property because the property, namely, the accumulations, are the fruit of that which was originally the deceased's own property. It is said that the deceased had immediately prior to the date of the settlement an interest in the income which the property, which he then owned, would produce in the future, and that he has none the less an interest, because at the time when the settlement was made the particular fruit, i.e., the accumulations, were not in existence. That was property to arise in the future, but it was said none the less property in which he had an interest because it was income which was to result from the property which he then owned. Further, it is said that he had an interest because if any of the trusts declared by the settlement failed for any reason at all, there would be the resulting trust for him and to that extent also he had an interest. In my judgment this latter contention is not well founded. A resulting trust arises when a settlor making a settlement of his property for some reason fails to dispose of the whole interest in that property. To the extent to which he has failed to make such a disposition the property remains in him, but, in my judgment, it is not right to say that because there might possibly be at

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some future time a failure of some of the trusts declared, which on the face of them appear to be exhaustive, that the settlor had an interest, not in the property settled, but in the accumulations which resulted from the directions to accumulate income contained in the settlement. In truth, if there were a resulting trust in this case, it would arise from a failure to dispose of the whole of the beneficial interest in the original property, and although no doubt that might comprise some portion of the accumulated fund, the accumulations themselves would not be the subject-matter of a resulting trust. With regard to the other contention that this settlor had an interest in the property, it is of course true to say that a man who makes a settlement out of his own property had an interest in the property because he himself owned the property before the settlement came into existence, but the real question here is, what is the property in which the settlor had such an interest as to come within this section, since to come within the section it must be shown that the settlor had an interest in the property so passing. What is the property so passing? Having regard to s. 2, sub-s. 1 (*d*), the property so passing is not the property which was settled by the settlor nor is it the whole of the beneficial interest in the fruit of that property, but it is an annuity or other interest provided by the settlor to the extent of the beneficial interest accruing or arising. That which is deemed to be property under s. 2 is an interest, and, in my judgment, in this case the settlor never had had an interest at all within the meaning of the section. He had an interest in the property which produced the income out of which the accumulations were to be made at the time when he made the settlement and before he parted with it, and he had rights as settlor in the event of a resulting trust, but the interest which is the subject-matter of this sub-section is not property in which he ever had an interest. For those reasons I have come to the conclusion that this is not property within s. 4 and is not, therefore, to be aggregated with the settlor's other property, and I will so declare.

Solicitors: *Cannon Brookes & Odgers; Solicitor of Inland Revenue.*

R. A. Y.

FARWELL
J.

1938
May 24.

In re BALFOUR'S SETTLEMENT.

PUBLIC TRUSTEE *v.* OFFICIAL RECEIVER.

[1938. B. 1012.]

Settlement of settlor's own property—Protected life interest—Discretionary trust—Capital moneys paid by trustee to tenant for life—Breach of trust—Claim by trustees to retain income of trust fund to make good the breach—Subsequent bankruptcy of tenant for life—Discretionary trust takes effect.

By a settlement made by N. H. B., dated October 27, 1894, the income of a settled fund was payable to N. H. B. for his life or until he should " do or suffer something whereby the same or some part " thereof would through his act or default or by operation or " process of law or otherwise if belonging absolutely to him " become vested in or payable to some other person or persons," with a discretionary trust over.

In the years 1933 to 1936 the then trustee of the settlement advanced to N. H. B., at his request, various sums out of the corpus of the trust fund, amounting in all to about 1400*l.* On August 17, 1937, the then trustees of the settlement asserted their right to retain the income of the fund in order to make good the breach of trust. On August 26, 1937, N. H. B. filed his petition in bankruptcy and was adjudicated bankrupt :—

Held, that, as the trustees of the settlement had asserted their right to retain the income before the date of the bankruptcy, the discretionary trust had come into force and nothing passed to the trustee in bankruptcy.

In re Brewer's Settlement [1896] 2 Ch. 503 distinguished.

ADJOURNED SUMMONS.

By a marriage settlement dated October 27, 1894, and made on the intended marriage of the defendant, Nigel Harington Balfour and the defendant, Grace A. M. Balfour, it was agreed that a sum of 20,000*l.* should be settled by N. H. Balfour, and that the trustees "shall pay the income of the said premises and "the investments for the time being representing the same to the "said Nigel Harington Balfour until he shall die or shall do or "suffer something whereby the same or some part thereof would "through his act or default or by operation or process of law "or otherwise if belonging absolutely to him become vested "in or payable to some other person or persons And after "the failure or determination of the trust hereinbefore declared

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"of the said income in favour of the said Nigel Harington "Balfour if the same shall fail or determine in his lifetime "shall if the trustees or trustee shall in their or his absolute "discretion think fit but not otherwise pay or apply such "income or any part thereof in their or his discretion for or "towards the maintenance and personal support of the said "Nigel Harington Balfour and Grace Annette Marie Madocks "and the child or children of the said marriage or for or "towards the maintenance and personal support of such one "or more to the exclusion of the others or other of such objects "of this discretionary trust or power in such manner as the "trustees or trustee shall think proper during the remainder of "the life of the said Nigel Harington Balfour and shall during "such remainder of the life of the said Nigel Harington Balfour "from time to time pay or apply all the residue not applied "under the discretionary trust or power lastly hereinbefore "contained of the said income or the whole of such income if "no part thereof shall be so applied in the manner in which the "same would be payable or applicable if the said Nigel "Harington Balfour were then dead and after the death of "the said Nigel Harington Balfour if the said Grace Annette "Marie Madocks shall be then living shall pay the said income "to her during her widowhood."

In the course of the years 1933 to 1936, Herbert Linnell, then sole trustee of the settlement advanced to the defendant, N. H. Balfour, out of the corpus of the trust fund at his request and in breach of trust sums amounting in all to a sum not exceeding 1400*l.* Linnell died on January 11, 1937, having by his will appointed his wife, who predeceased him, and the Westminster Bank, his executors, and the Westminster Bank duly proved the will on April 5, 1937. When the Westminster Bank received the income of the trust fund they realized that there had been a breach of trust. On August 16, 1937, they had in their possession 338*l.* 17*s.* 11*d.* income of the trust fund, which they refused to pay over to the defendant, N. H. Balfour, claiming to be entitled to retain the same for making good the breach, and by a letter dated August 17, 1937, their solicitors wrote to the solicitors of

N. H. Balfour a letter in which they finally insisted upon their claim to retain the income. On August 26, 1937, N. H. Balfour filed his petition in bankruptcy and was adjudicated bankrupt, the Official Receiver being appointed the trustee in bankruptcy. On November 4, 1937, the plaintiff, the Public Trustee, was appointed trustee of the settlement.

In these circumstances the plaintiff took out this summons, asking whether in the events which had happened the income of the funds, subject to the settlement, since the bankruptcy of N. H. Balfour, was payable to the Official Receiver in Bankruptcy or whether the same was applicable under the discretionary trust contained in the settlement.

J. H. Stamp for the plaintiff. The trustees of the settlement having asserted their right to retain the income of the fund for the purpose of making good the loss sustained by the breach of trust before the date of the bankruptcy the trustee in bankruptcy can take nothing.

L. W. Byrne for the Official Receiver in Bankruptcy. Where a beneficiary has been a party and benefited by a breach of trust he must make good the loss to the trustees: *Raby* v. *Ridehalgh* (1); *Bolton* v. *Curre* (2); *Fletcher* v. *Collis* (3).

The tenant for life's interest had not been determined at the date of his bankruptcy and when the funds lost by the breach of trust are replaced, his life interest will pass to the trustee in bankruptcy. The words in this settlement are very like the words in *In re Brewer's Settlement* (4), and I rely on that case.

J. F. Bowyer for N. H. Balfour.

R. L. A. Hankey for other defendants.

FARWELL J. The question is whether the trustee in bankruptcy is entitled to receive the income of this fund, or whether the tenant for life had forfeited his right to the income prior to the bankruptcy, in which case at the date of the bankruptcy the discretionary trust was in operation, and there was nothing which could pass to the trustee in bankruptcy.

(1) (1855) 7 De G. M. & G. 104.
(2) [1895] 1 Ch. 544.
(3) [1905] 2 Ch. 24.
(4) [1896] 2 Ch. 503.

There is in my view no doubt as to what is the effect of a breach of trust of this sort, a breach of trust committed by a trustee at the instigation of the tenant for life, in order to benefit the tenant for life. In such a case both the trustee and the tenant for life are liable to the other beneficiaries. Moreover, the trustee is entitled to be indemnified by the person on whose behalf the breach has been committed and who has received the money. The principle that a beneficiary, who has had out of a trust fund more than he is entitled to, is not entitled to further moneys out of that fund until he has replaced the amount he has been overpaid, is well settled. In the present case, as soon as the Westminster Bank, as the trustees, asserted, as they did in the letter dated August 17, 1937, their right to retain the moneys which would otherwise have been payable to the tenant for life for the purpose of recouping the capital moneys which he had received, they were asserting a right they were entitled to assert, and had the tenant for life at that time endeavoured by any process of the Court to obtain an order on the trustees to pay over the money, he would have failed. The trustees were acting within their legal rights. They were entitled to say, "We will not "pay you any more until the amount is made good which "has been lost to the trust fund, and we therefore retain the "income for that purpose." Being thus entitled to assert this right they did assert it, and as from that time the income which would otherwise have been payable to the tenant for life became vested in or payable to some other person or persons, that is to say, the right to receive the income and to retain it became vested in the trustees who were asserting the right which they had.

In my judgment the general principle applicable to a breach of trust of this sort is quite plain, and the result must be that which I have stated. Mr. Byrne on behalf of the trustee in bankruptcy quite properly has drawn my attention to a decision of Chitty J. The case is not unlike the present one, and it might seem to suggest that the view which I have taken is not the right one. It is *In re Brewer's Settlement.* (1) There

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(1) [1896] 2 Ch. 503.

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was a settlement "upon trust to pay the income to" a named person "until his death or bankruptcy, or until he should "'assign charge, or incumber the said income or do or suffer "'anything whereby the same or some part thereof would "'through his act or default become payable to or vested in "'some other person or persons' with remainder in favour of "the children of the marriage." In that case the settlor induced the trustee to let him dissipate part of the trust fund and the money was spent by him for his own purposes. Then the settlor became bankrupt and proceedings were taken by the children of the marriage, with the result that the funds lost by breach of trust were replaced, and the question raised was whether the settlor's interest had been forfeited prior to the bankruptcy by the dissipation of the trust fund. It was held, "that the settlor's interest had not been determined "prior to the bankruptcy; and that, as the limitation until "bankruptcy was void as against his creditors, his life interest "passed to the trustee in bankruptcy, and that the income "of the trust fund was now payable to a purchaser from the "trustee during the life of the settlor." The passage which is material for this purpose is in the judgment of Chitty J., where he said this (1), "For the purpose of the present "question it appears to me to be immaterial whether the loans "were breaches of trust or not. Undoubtedly they were breaches "of trust. The tenant for life was liable to replace the fund, "but without interest; the income still belonged to himself "and to no one else. So long as the money was in his hands "and capable of being followed, the money itself might have "been recovered from him, but the right to the income did not "pass from him. After he had spent it in the manner "described, it could no longer be followed: the tradesmen "and others to whom he paid it were, undoubtedly, purchasers for value without notice; the money in their hands "ceased to have any existence as a trust fund. I think that it "would be an extravagant refinement to say that every "sovereign as he paid it away still remained part of the trust "fund and was producing an income, and that such income

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(1) [1896] 2 Ch. 503, 506.

"was payable to or vested in the persons who had received the "sovereign or other the money thus paid away. In my "opinion, after the money had in the first instance been lent, "and subsequently after it had been spent, the income of the "trust fund did not become payable to or vested in any "person or persons other than the tenant for life." What the learned judge is considering is the income which had actually been paid in breach of trust to the tenant for life. He does not seem to have taken into consideration the income of the rest of the trust fund which might otherwise have been payable to the tenant for life.

In my judgment the real distinction between *In re Brewer's Settlement* (1) and the present case is this. In that case there had been no assertion of right by the trustees to impound the income prior to the date of the bankruptcy. The right of a trustee to impound is not in my judgment anything more than an inchoate right. He is not bound to assert it. If he chooses to replace the trust fund out of his own pocket, he is not bound to call upon the tenant for life to replace it, but if he does assert his equity and retains the income in his hands, doing so under his right to recoupment, then as from that moment in my judgment the future income of the trust fund which would otherwise have been payable to the tenant for life ceases to be payable to him, and as from that moment his life interest is forfeited. Accordingly, in my view, in this case, as soon as the Westminster Bank ceased to pay over the income to the tenant for life on the ground that they were retaining it to make good the breach of trust, the income ceased to be payable to him. It was only after that date that the tenant for life became bankrupt. As at the date of bankruptcy the income had ceased to be payable to the bankrupt, and there was therefore nothing which can pass to the trustee in bankruptcy.

Solicitors: *Rawlinson & Son; Tarry, Sherlock & King; Baileys, Shaw & Gillett.*

P. J. B.

(1) [1896] 2 Ch. 503.

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1938

June 22.

ATTORNEY-GENERAL *v.* WILCOX.

[1937. A. 935.]

Public right of way—Footpath—Towing-path—Obstructions—Nuisance—Technical obstruction—No substantial interference—Obstruction beneficial to user of way.

A person claiming to be the owner of the soil of a piece of land, forming part of a towpath over which the public had a right of way on foot and a right of towage, erected posts which did not substantially interfere with the user of the way by foot passengers, but would to some extent obstruct the towing of barges by means of ropes. The Attorney-General on the relation of an Urban District Council brought an action for a declaration that the posts were an obstruction to the public highway and a public nuisance and for an injunction :—

Held, although the public have a right to use the whole of a public right of footpath, the Court will not interfere with a technical obstruction which does not substantially interfere with the use of the way, particularly if, in all the circumstances of the case, the obstruction results in the way being made more convenient or commodious for the public ;

but *Held* that, as the posts might be dangerous at night, if not lighted, and would interfere with the right of towage, the plaintiffs were entitled to a declaration and an injunction.

ACTION.

The plaintiff in the action was the Attorney-General at the relation of the Urban District Council of Esher. The defendant was Mr. William Arthur Wilcox, the owner in fee simple of a piece of land now known as "The Upper Deck," situate immediately to the south of a towpath along the River Thames near Esher. The piece of land in question was a triangular piece of land bounded on the north side by the towpath and on the south side by a road known as Hurst Road. The plaintiff sought a declaration that certain posts which had been erected by the defendant across a portion of the towpath were an obstruction to the public highway and/or a public nuisance, and asked for: "An injunction to restrain the "defendant his servants or his agents from erecting or causing "or allowing to remain any posts or other obstructions in or "about the said towpath and from in any way stopping or "interfering with the user thereof by the public on foot for all "purposes or with horses or other draught animals for the "purposes of towing."

The following statement of facts was agreed: "The defendant "is the owner of a parcel of land formerly known as 'Lockangles' "but now known as 'The Upper Deck' situate at East "Molesey in the Urban District of Esher and coloured pink "on the plan attached hereto. The towpath which the "defendant claims is his property is coloured green on the said "plan. The said parcel of land is held by the defendant "under a conveyance dated March 23, 1936, a copy of "which is annexed hereto. The defendant upon the said "land coloured pink on the said plan has constructed a "swimming pool and an amusement park to which the public "resort. The defendant and the public resorting to his "premises have suffered annoyance and damage, particularly "in the summer months of the year 1936, from the use of "the said towpath by persons bringing motor-cars, ice-cream "barrows and other vehicles thereon. The Relator Council "had no knowledge as to any complaints as to the user "of the said towpath until after the defendant had erected "the posts hereinafter referred to. By an order of the Court "of Appeal made in the case of *Thames Conservators* v. *Kent* (1) "it was declared that the public were entitled to go on and "pass along the said towpath on foot for all purposes whether "of profit or pleasure or with horses or other draught animals "for the purposes of towing. The Relator Council, who are "the highway authority, have taken no action to prevent the "use of the said towpath by persons other than those who are "entitled to use it. Posts have been erected across the said "towpath by the Conservators of the River Thames, but are "not sufficiently close to prevent the use of the said towpath "by persons other than those who are entitled to use it. In or "about August, 1936, the defendant his servants or agents "erected in the said towpath six wooden posts 4 feet or there-"abouts in height at distances of 3 feet or thereabouts apart "and seven wooden posts 4 feet or thereabouts in height at "distances of 3 feet or thereabouts apart. The said towpath

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(1) [1918] 2 K. B. 272.

"is 21 feet wide at the western boundary of the defendant's land "and 24 feet 6 inches wide at the eastern boundary thereof. "The said posts are unlighted. Complaints were received by "the Relator Council of the erection of the said posts. On "October 28, 1936, the Relator Council by a letter from their "clerk required the defendant to remove the said posts. The "defendant refused so to do. On or about November 6, 1936, "the Relator Council by their servants removed the said posts. "On or about November 9, 1936, the defendant his servants "or agents re-erected the said posts in the said towpath in or "about the same positions. The Relator Council by a letter "dated January 5, 1937, from their clerk to the solicitor for "the defendant required the defendant to remove the said "posts, but the defendant, by letter dated February 11, 1937, "from the defendant's solicitor to the clerk of the Relator "Council, refused so to do."

C. Erskine Simes for plaintiff. There have been a number of decisions in cases of this kind: in some the Courts have ordered the removal of the obstructions, although they were only technical obstructions and did not interfere with the public user, and in other cases the Courts have refused to interfere where the obstructions were of that nature. In *Thames Conservators* v. *Kent* (1) there was a declaration that the public were entitled to use the towing-path in question here on foot for all purposes or with horses for the purposes of towing. The defendant has erected a number of posts on the towing-path, which the plaintiffs say are a serious obstruction to the user of the towing-path, and they ask for an injunction to restrain the defendant from allowing them to remain. In *Reg.* v. *United Kingdom Electric Telegraph Co.* (2) the defendant company were indicted for erecting telegraph posts on the side of a highway. In *Pullin* v. *Deffel* (3) it was held that the public had a right to the user of the whole length and breadth of a bridle road and footway. [He also referred to *Ellis* v. *Woodbridge.* (4)]

(1) [1918] 2 K. B. 272.
(2) (1862) 6 L. T. 378.
(3) (1891) 64 L. T. 134.
(4) (1860) 8 C. B. (N. S.) 290.

Harold B. Williams for defendant. The defendant is the owner of a piece of land abutting on the towing-path and he claims to be the owner of the soil of the part of the towing-path adjacent to his land. He has constructed a swimming pool and an amusement park on his land, and he says that he has suffered annoyance and damage from the use of the towing-path by persons bringing motor-cars, ice-cream barrows and other vehicles thereon. It was to prevent such illegal user of the towing-path that he erected the posts. They are not really obstructions to the proper user of the towing-path. If they are obstructions at all, they are only technical obstructions and the Court will not interfere. The plaintiffs, the Esher Urban District Council, could not remove the posts without an order of the Court: *Murray* v. *Epsom Local Board.* (1) In *Reg.* v. *Russell* (2), where a question of right of way over water arose, it was held that a judge was correct in directing a jury to acquit the defendant if they found that the obstruction was so slight as not to amount to a nuisance. In *Rex* v. *Bartholomew* (3) the defendant was indicted for a nuisance in obstructing a roadway by the erection of a coffee stall. The jury found that the coffee stall was an obstruction, but that it did not appreciably interfere with the traffic in the street, and it was held that the findings of the jury did not justify the entry of a verdict of guilty. Lord Alverstone C.J. there (4) referred to *Reg.* v. *Lepine.* (5) Then there were cases in which the obstructions were held to be beneficial rather than a nuisance: *Rex* v. *Russell* (6); *Rex* v. *Ward* (7). *Attorney-General* v. *Terry* (8) finally disapproved of *Rex* v. *Russell* (6), and the principle laid down in that case has never been followed since. All the cases show that the obstructions must render the way less commodious to the public, and there is no evidence of that here. If the obstructions do not interfere with the user of way by the public they are not a nuisance, and the Court will not interfere by ordering their removal. [He also referred to *Rex* v. *Lord Grosvenor*. (1)]

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(1) [1897] 1 Ch. 35, 39–40.
(2) (1854) 3 El. & Bl. 942.
(3) [1908] 1 K. B. 554.
(4) Ibid. 554, 561.
(5) (1866) 15 L. T. 158.
(6) (1827) 6 B. & C. 566.
(7) (1836) 4 Ad. & E. 384.
(8) (1874) L. R. 9 Ch. 423.

Simes in reply. The question of the degree of the obstruction is somewhat limited, and the defendant must show that the obstructions do not in any way inconvenience the public. In *Rex* v. *Bartholomew* (2) the obstruction was only technical.

FARWELL J. This action has given rise to extremely interesting arguments, and I am much indebted to counsel on both sides for the assistance which they have given me. The parties have been able, I think very wisely, to agree a statement of facts, and it has not been necessary to call any oral evidence, and it falls to me to decide the question which I have to decide on the facts as so stated and agreed. [His Lordship read the agreed facts, and continued :]

I must refer in a moment to the conveyance ; but before doing so I may say that it has been suggested that there are two issues which I have to consider in this action. First, a question whether the towpath immediately to the north of the land which was purchased by the defendant is in fact the property of the defendant or is the property of somebody else. For myself I cannot see that that is a very material question. If what the defendant has done amounts to an actionable nuisance by obstructing the right of the public to use the way for the purpose for which it has been held they are entitled to use it, the plaintiff is entitled to relief against him whether he be the owner of the soil or whether he be a mere trespasser. No doubt the only person who can sue the defendant in trespass is the owner of the property or the person in possession of the property, but this action is not strictly an action in trespass at all, it is an action in nuisance, the nuisance being the obstruction of the public highway. In my judgment, an owner who erects obstructions on a public highway, although the soil of the public highway may be in him, is none the less committing an actionable wrong to the public and one which he can be prevented from doing at the suit of the Attorney-General on behalf of the public, and whether the soil in this particular portion of the towpath does or does not belong to the defendant is, in the view I take of this case, not a very material consideration; but it has been raised, and therefore it is right that I should express my view upon it.

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(1) (1819) 2 Stark. 511.

(2) [1908] 1 K. B. 554.

[His Lordship then considered at some length the conveyance of March 23, 1936, and he held that the towpath, which the defendant claimed as his property, did not belong to him, and continued:]

The effect of that is that, if the plaintiff here was suing in trespass, his position might be one of more difficulty, but strictly he is not suing in trespass, but in nuisance. His case is that the defendant has done that which causes an obstruction to the public footway, and that by those acts the defendant has been guilty of a nuisance and that the law will restrain him from committing such a nuisance and will moreover require him to remedy that which he has done. It seems to me, therefore, that I need consider no further this question as to the title of the defendant to the soil of the towpath, because whether he is the owner or not, if the plaintiff is right, he is entitled to succeed.

The real question, therefore, is this: Has the defendant by placing these posts across the towpath done something which he is not entitled to do, whether he be the owner of the soil or not? I have been very properly referred to a considerable number of authorities in which the rights of the public in public highways and public footpaths have been discussed, and those authorities have been of the greatest assistance to me in arriving at the conclusion to which I have come. I do not think, however, that it is necessary for me to travel through the various cases, because in my view there is a principle which is to be extracted from those decisions, which may be stated in this way. Where there is a public right of way, whether a public footpath or a public right of way of a wider nature over a defined area of land, the public have the right to use that defined area for the purpose of passing and repassing, and they are entitled, prima facie, to use any part of it between the hedge or fence or other boundaries of the way, whether it be the grass verge or a portion of the way which is metalled or made up. Their right, prima facie, is to use any part of the way for the purpose of passing and repassing. Therefore, anything which is placed in the defined area in question which prevents to the smallest degree any member of the public using the whole of the way is an obstruction, but it does not follow that because some person has placed in the way something which is an obstruction in the sense that thereby a member of the public cannot put his foot on some particular portion of the highway that that person has thereby committed an actionable nuisance. As I have said, prima facie, it is an unlawful act to put anything on a public way which obstructs in the smallest degree the exercise by the public of their rights; but the Court will not interfere where what has been done is something which is of so trivial a nature as not to constitute a substantial interference, as, for instance, in a case where the alleged obstruction is only of a temporary nature. Take, for instance, the stopping of a van or a cart for the purpose of letting out passengers or unloading. Prima facie, to keep a vehicle on a public highway for an unreasonable time is an obstruction, but, on the other hand, merely to stop a vehicle for the purpose of loading or unloading may not in itself, although it causes a physical obstruction, be such an obstruction as to entitle any one to object. In all these cases, therefore, the question resolves itself into one of degree.

It appears that at one time it was thought that if it could be shown that as a result of the obstruction, although one which prima facie was an illegal act and gave rise to a right in the public to object, there was some countervailing advantage to be gained from the obstruction, that could be set off, as it were, against the obstruction itself; and if the Court came to the conclusion that on balance it was for the benefit of the public that there should be an obstruction, that might afford a good defence to the claim for relief. I do not think, as the cases stand now, that that is the law or that the position can be put nearly so high as that. I think the cases show that that view which was taken at one time is erroneous, but none the less I think it is clear on the authorities that when the Court is considering whether relief should be granted the whole of the circumstances must be considered. Where a comparatively trivial obstruction results on the whole in the way being made more convenient or commodious for the public, although there is a technical obstruction, the Court may not think it right to interfere, if the result of what has been done is to enable the public to exercise their rights with greater facility and more convenience. It is said here that the erection of these posts has that effect, because, prior to their erection, persons on bicycles offering to sell ices and other vehicular traffic have been in the habit of using the path, which caused obstruction and, possibly, danger to the public, and that by preventing by means of the posts vehicular traffic from using the towpath, the public has been benefited and safeguarded, and that increased safety and facility of user ought to be treated as amply compensating the public for the very small obstruction caused by the posts. I think that these are circumstances which I ought to take into consideration, not because the alleged benefit can be treated as a set-off of the obstruction, but because the Court must take into consideration all the surrounding circumstances and determine whether there has been in fact any such interference with the rights of the public as entitles the plaintiff to the relief which he seeks, bearing in mind the alleged benefit as well as the alleged obstruction. That is the test which, in my judgment, I must apply here.

In the present case the position is this. Prior to the erection of these posts, posts had been erected by the Thames Conservancy on another part of the towpath which prevented vehicular traffic getting on to this particular part of the towpath from the east, but from the west there was nothing physically to prevent a small wheeled cart or a bicycle from going over the way. On the other hand, the whole of the towpath was available to the public, not only for the purpose of passing and repassing, but also for the purpose of towing barges and other floating boats on the River Thames. It has been held that the public have the right to use this way for towing purposes, and therefore are entitled to take along the towing-path a horse or other beast of burden

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for the purpose of towing, and that right must involve the right to have the necessary ropes attached to the horse at one end and that which is being towed at the other, and to have the rope at the correct angle along and across the towpath for towing purposes. It may well be the fact that the use of the towpath for towing purposes has decreased very greatly in modern times, but none the less the public has the right, if they desire so to do, to use the path for towing by horses or other beasts of burden ; that is a right with which no one is entitled to interfere. In my judgment, it is impossible to say that the presence of these posts is not an interference with the right of the public to use the towpath for towing purposes. It seems to me almost impossible to suppose that, except by lifting the rope over the posts, the use of the towpath as a towpath has not been practically prevented. It may be that there is sufficient room left between the posts to take the beast drawing the boat through, but an interference with the rope would be sufficient, in my judgment, if it is a real interference, to entitle the plaintiff to the relief which he seeks. Although it may be possible to get over the difficulty caused by those posts by lifting the rope over them, in my judgment the public are not bound to put up with that inconvenience so caused to them, and, if the erection of the posts does cause them that sort of inconvenience, by putting them to the extra trouble of manipulating the rope over these posts, then there is an obstruction which is sufficient to entitle the plaintiff to maintain this action.

So far as the foot passengers alone are concerned, I think that there is very much less real obstruction. The members of the public cannot, of course, so long as the posts are there, use every portion of the whole of the towpath. They have to avoid the posts so long as the posts are there, but that in itself, the small deviation which may be necessary to pass through the posts, is trifling and one that by itself might not be sufficient to justify the Court in giving the relief which is sought ; but it has to be borne in mind that these posts are not lighted and that any person proceeding along the towpath on a dark night might very easily fail altogether to see the obstruction, with the possible result that a member of the public might be seriously interfered with and possibly hurt by colliding with the posts. Therefore, although I think that the use by foot passengers of this particular part of the towpath is interfered with only to a small extent, nevertheless, having regard to the rights of the public to use the towpath for towing and the fact that there is some obstruction of their rights as foot passengers, in my judgment the plaintiffs have made out their case, and this is not a case where I can say that any benefit which the public may derive from the prevention of vehicular traffic on this part of the towpath by the posts is sufficient to make the way itself better and more convenient for the public, so that they can exercise their rights better and more conveniently than they could exercise them before the posts were erected, and that therefore there has been no serious interference with those rights. It is in each case a question of degree, and in this case one which I have to decide on the facts as they appear from the agreed statement of facts. Giving the best consideration I can to the facts so stated, having regard to the particular circumstances of this case and the position of the land in question, I have come to the conclusion that the plaintiffs are entitled to a declaration that the posts are an obstruction to the public highway, and to the injunction which they seek.

Solicitors for plaintiffs: *Lees & Co., for Frederick Edwards, Esher.*

Solicitors for defendant: *Wilkinson, Howlett & Moorhouse.*

P. J. B.

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July 12, 13, 27.

HANSCOMBE *v.* BEDFORDSHIRE COUNTY COUNCIL.

[1937. H. 2921.]

Highway—Ditch the property of the owners of adjoining land—Pipes placed in ditch by the highway authorities, without the knowledge or permission of the owners of adjoining land—Trespass—Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 67—*Highway Act*, 1864 (27 *&* 28 *Vict. c.* 101), *ss.* 47, 48, *sub-ss.* 2, 3.

A highway authority placed pipes in a ditch belonging to the owners of land abutting on a highway, without their knowledge or consent, and filled in the ditch. The pipes effectively drained the adjoining land and the highway. The owners of the land brought an action against the highway authority, claiming (inter alia) a declaration of title and damages for trespass. The highway authority pleaded that the acts done by them were improvements in the road, which a highway authority was authorized to make by ss. 47 and 48, sub-ss. 2 and/or 3, of the Highway Act, 1864, or, alternatively, that s. 67 of the Highway Act, 1835, authorized a highway authority to do such acts.

Sect. 47 of the Highway Act, 1864, provided that: " A highway "board may make such improvements as are herein-after mentioned "in the highways within their jurisdiction." Sect. 48 provided that: " The following works shall be deemed to be improvements "of highways: . . . . (2.) The widening of any road, the cutting "off the corners in any road where land is required to be purchased "for that purpose, the levelling roads, the making of any new "road, and the building or enlarging bridges: (3.) The doing of "any work in respect of highways beyond ordinary repairs essential "to placing any existing highway in a proper state of repair."

Sect. 67 of the Highway Act, 1835, provided that the highway authority (as surveyor of highways) "shall have power to "make, scour, cleanse and keep open all ditches, gutters, drains, "or watercourses, and also to make and lay such trunks, tunnels, "plats, or bridges as shall be deemed necessary, in and through "any land or grounds adjoining or lying near to any highway, upon "paying the owner or occupier of such lands or grounds . . . . "for the damages which he shall sustain thereby" :—

Held, that none of the above mentioned sections entitled the highway authority to trespass on the ditch and lay pipes, without the permission of the owners of the adjoining lands.

WITNESS ACTION.

In this action the plaintiffs were the owners in fee simple of land abutting on a highway, and the defendants were the highway authority of the district. In 1937 the defendants

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laid a socketed pipe in a portion of a ditch belonging to the plaintiffs which ran between the hedge of the plaintiffs' land and the verge of the highway, and filled up that portion of the ditch with soil and other substances. The pipes effectively drained the plaintiffs' land. These acts were done without the knowledge or consent of the plaintiffs. The plaintiffs then commenced this action, in which they claimed: (1.) a declaration of title; (2.) a mandatory injunction, which was abandoned at the Bar; (3.) damages for trespass; (4.) an injunction to restrain the defendants from entering on the ditch.

The defendants alleged that the acts done by them were improvements in the road, which they were authorized to make by ss. 47 and 48, sub-ss. 2 and/or 3, of the Highway Act, 1864. In the alternative they deemed it necessary to act as they had done, and they relied on s. 67 of the Highway Act, 1835.

The facts appear fully in the judgment.

R. F. Roxburgh K.C. and *Geoffrey Barratt* for the plaintiffs. The presumption is that a ditch running beside a highway has not been dedicated to the use of the public and that it is the property of the owner of the land abutting on the highway. Therefore any one interfering with the ditch is a trespasser: *Harrison* v. *Duke of Rutland.* (1) The presumption can be rebutted by evidence (see *Chorley Corporation* v. *Nightingale* (2)), but there is no evidence here to rebut the presumption. The defendants had no right to lay these pipes. They committed a trespass in doing so, and the plaintiffs are entitled, at the least, to a declaration of title and to damages for trespass. [They also cited *Field* v. *Thorne* (3), and referred to Lumley's Public Health, 10th ed., vol. i., pp. 779–80.]

R. M. Montgomery K.C., *C. Montgomery White* and *H. Whitbread* for the defendants. The public are entitled to the use of every portion of a highway lying between the hedges enclosing it: *Reg.* v. *The United Kingdom Electric Telegraph Co.* (4) The defendants were, therefore, entitled to go on to the

(1) [1893] 1 Q. B. 142, 155.
(2) [1906] 2 K. B. 612.
(3) (1869) 20 L. T. 563.
(4) (1862) 3 Fos. & Fin. 73.

ditch and lay these pipes, but they are bound to drain the higher land belonging to the plaintiffs: *Gibbons* v. *Lenfestey*. (1)

Even if the defendants were not entitled by common law to do the acts complained of, they have statutory rights enabling them. Sect. 47 of the Highway Act, 1864, entitles the roadway authorities to make any of the after mentioned improvements in the highways under their jurisdiction, and by s. 48, sub-s. 3, such improvements include the doing of any work essential to placing a highway in a proper state of repair. The evidence in this case shows that the work done was essential within the meaning of s. 48, sub-s. 3. Even if those sections did not enable the defendants to lay these pipes, s. 67 of the Highway Act, 1835, gave them ample powers to do so, on paying damages: *Earl Derby* v. *Bury Improvement Commissioners*. (2)

Roxburgh K.C. in reply. Sect. 47 of the 1864 Act is an enabling section, but it has nothing to do with what the roadway authorities can do as against the owners of adjoining land. Sect. 67 of the 1835 Act does not assist the defendants: it does not authorize the authority to fill up a ditch. If the defendants wished to make any improvements to the highway, they should have acted under s. 53 of the 1864 Act. Here they have come on the plaintiffs' land and laid these pipes, without giving notice to the plaintiffs or asking their permission, or offering to pay any compensation or damages.

Cur. adv. vult.

1938. July 27. FARWELL J. In this case the plaintiffs, as trustees of the will of the late William Hanscombe, are the owners in fee simple of the land situate on both sides of, and abutting on, a highway known as High Road, in the village of Shillington in the county of Bedford. The defendants are the County Council of Bedford, and, as such, the highway authority for the district.

The subject-matter of the dispute is a small portion of a

(1) (1915) 113 L. T. 55.

(2) (1869) L. R. 4 Ex. 222.

ditch abutting immediately on the east side of the High Road leading from Henlow south towards Hitchin. The road is bounded on each side at this point by a hedge or fence, and the ditch is within and on the road side of the fence. The land immediately abutting the portion of the ditch in question is in the occupation of one Cole as tenant of the plaintiffs.

In 1937 the defendants, acting under the circumstances mentioned hereafter, laid 6-inch socketed, but not cemented, pipes in the portion of the ditch in question, and filled in that portion of the ditch completely. These acts were done without the knowledge or consent of the plaintiffs, who claim that they constitute a trespass on their property.

The defendants seek to justify what they have done on alternative grounds: (1.) that the portion of the ditch in dispute is or was vested in them as part of the highway, or (2.) if that is not so, that the acts done were within the scope of their statutory powers. The highway is admittedly an old way, and no evidence has been given as to when, or by whom, or under what circumstances, or on what terms, it was dedicated to the public. The ditch, a small portion of which is in dispute, served for many years to carry the overflow from a pond situate on the plaintiffs' land on the east side of the road. The ditch, starting from the pond, runs in a north-westerly direction, and is joined by another ditch running approximately due west; it then proceeds in a westerly direction for a short distance and then turns almost due north, and prior to 1937 ran along the high road past Cole's land to a point somewhat to the north of that land, where it leaves the high road and runs north to empty into another pond from which there is an overflow on the north side. The land to the east of the high road slopes upwards, and the surface-water from that land drains into the ditch, and the ditch was undoubtedly of importance to the plaintiffs and their predecessors in title, both to carry away the overflow from the pond and to carry away the surface-water from the higher land to the east of the road. The ditch is also required to carry off the surface-water from the road, and channels have been cut in the grass verge, between the road and the ditch, to carry such water into the ditch. Until the happening of the events which give rise to this action, the defendants never exercised any acts of ownership over the ditch. The ditch was at all times kept cleansed and in order by the plaintiffs' servants or agents; and, moreover, the plaintiffs' predecessors had from time to time done certain works in connection with the ditch such as the insertion of an inspection chamber and the diversion of the greater part of the overflow from the pond and the sinking of an artesian well to carry water therefrom along pipes parallel to the ditch. As a result of the work done by the plaintiffs or their predecessors immediately prior to this action, little or no overflow from the pond passed down the ditch past Cole's land, although it continued to carry off all water draining into it from Cole's land and other land of the plaintiffs to the east of the road. At the part of the road abutting on Cole's land the highway is somewhat narrow, the metalled portion being 15 feet 6 inches, and in 1937 a heavy lorry passing along the road opposite Cole's land ran too near the ditch and one wheel slipped over the edge of it. It was found difficult to extricate the lorry from its position, and, in so doing, the bank of the ditch on the roadside was broken away. The defendants, by their agents, in order to preserve the road and to safeguard the user of it, did their best to repair the bank, but found it impossible to do so satisfactorily. Accordingly they laid 6-inch pipes in the drain, to carry away the water, and then filled in the ditch completely. I am satisfied on the evidence that the repair of the bank of the ditch was necessary to safeguard the road, and that for that purpose, apart from any question of the plaintiffs' rights, the method adopted was a proper one. Moreover, the laying of the pipes in the ditch, in the way in which they were laid, preserved the use of the ditch for carrying away all surface-water or other water getting into it. Nevertheless, if the ditch is the plaintiffs' property, the acts constituted a trespass by the defendants and, unless they are within their statutory powers, the plaintiffs are entitled to complain.

I may say at once that, in my judgment, if the plaintiffs are right in this action, the acts complained of have not resulted

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in any substantial damage. I am satisfied that the pipes laid by the defendants are as effective as the ditch was to carry away the surface-water, and that nothing they have done has rendered Cole's cottage damper than it was before the acts complained of were done.

Under these circumstances, it is necessary to consider what is the legal position of the parties. If the ditch in question is vested in the defendants, cadit quæstio. I will, therefore, first consider the question of title. As I have already said, the land on both sides of that portion of the road is the property of the plaintiffs, and that which is vested in the defendants as the highway authority is the high road, and whether this ditch is vested in them must depend on whether or not it forms part of that which was dedicated to the public. The rights of the public in a high road are to pass and re-pass along it, and their right to use the way for that purpose is not limited to that part of the way which is metalled or made up, but extends to the whole highway. When, therefore, the whole portion of a highway which is bounded by a fence or hedge is capable of being used to pass and re-pass, the whole portion is deemed to have been dedicated to the public. When, however, a portion of the whole is a ditch which prima facie is not adapted for the exercise by the public of their right to pass and re-pass, the presumption, in my judgment, is that the ditch does not form part of the highway. That is a presumption which may be rebutted (see *Chorley Corporation* v. *Nightingale* (1)), but the onus lies on those who assert that the ditch is part of the highway.

In the present case there is, in my judgment, no sufficient evidence to rebut the presumption. Some effort was made to show that at one time the hedge on the eastern side of the road north of Cole's land was set back much further than it is at present, and that the ditch was well within the hedge for a considerable distance. But even if the evidence adduced is admissible at all, which I doubt, it is, in my view, wholly insufficient to rebut the presumption. Even if there was at one time a considerable space between the ditch and the hedge, there is nothing to indicate that the space was part of the highway and not waste of the manor, as it may well have been. Further, I think that in a case of this kind the presumption against the ditch being part of the highway is extremely strong. No doubt the ditch serves a useful purpose in draining the road, but quite obviously it was, and is, of the greatest importance to the owner of the adjoining land on the east to preserve his rights in it. It was almost essential for draining his land and, to my mind, it is impossible to suppose that any owner, when dedicating the road, could have intended to part with his rights in the ditch. There is no suggestion in this case that the dedication was made subject to any such rights, and, in the absence of some affirmative evidence to the contrary, the presumption that the ditch is not part of the highway must prevail. In cases where the only purpose of the ditch is to drain the highway, the presumption may be more easily rebutted, but that is not so in this case, and the defendants have failed to satisfy me that the ditch is vested in them.

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(1) [1906] 2 K. B. 612.

That being so, I have now to consider whether the acts complained of were within the statutory powers of the defendants. The defendants rely on s. 67 of the Highways Act, 1835, and s. 48 of the Act of 1864. In my judgment, neither of these sections assists the defendants. I can find nothing in the first section referred to which authorizes a highway authority to fill in a ditch belonging to another, and the defendants therefore cannot rely on that section. By the Act of 1864, which must be read in conjunction with the earlier Act, a highway authority is authorized to do various acts for improving roads and, for that purpose, to acquire property or rights compulsorily upon giving the requisite notice to the owner. But there is nothing, in my judgment, in that Act, even when read in conjunction with the earlier Act, which authorizes a highway authority to go upon the land of an adjoining owner to fill in a ditch on his land without his consent. If it is necessary to widen the road by taking in the ditch and filling it in, the highway authority may no doubt take the necessary steps to acquire the land for that purpose ;

but they would only be entitled to acquire it on such terms as may be proper having regard to the rights of the owner as to drainage or otherwise; but, not having taken any such steps in this case, the defendants are not entitled to fill in a ditch without regard to the rights of the owner.

It was stated at the Bar that the defendants had no desire to prevent the owner using the pipes for drainage purposes; but no proposal to preserve such rights to him in any legal form has been made, and, although the present authority may not raise any such objection, it does not follow that their successors will adopt the same attitude.

For these reasons I have come to the conclusion that the plaintiffs are entitled to succeed in this action. They have very properly abandoned at the Bar their claim for a mandatory order, and I see no ground at the present time to grant an injunction, but I will give them liberty to apply. They are entitled to a declaration of title and to nominal damages of forty shillings, together with the costs of the action, the costs to be taxed on the High Court scale.

Solicitors for plaintiffs: *Pothecary & Barratt, for Hawkins & Co., Hitchin.*

Solicitors for defendants: *F. Venn & Co., for J. B. Graham, Bedford.*

P. J. B.

MORTON
J.

1938

July 15.

In re CURRYER'S WILL TRUSTS.

WYLY *v.* CURRYER.

[1938. C. 1615.]

Will—Residue—Gift in alternative events—Perpetuity—Validity.

By his will a testator provided: " . . . . on the decease of my "last surviving child or on the death of the last surviving widow or "widower of my children as the case may be whichever shall "last happen I direct my trustees to stand possessed of the "trust fund (that being the testator's residuary estate) . . . . . in "trust for my grandchild or grandchildren living at the period "of distribution and the issue then living of my grandchild or "grandchildren dying before that period . . . ." :—

Held, that the words "on the decease of my last surviving "child or on the death of the last surviving widow or widower of my "children" adequately expressed alternative events, and that the words "as the case may be whichever shall last happen" did not cause the gift of residue to offend the rule against perpetuities.

Monypenny v. *Dering* (1852) 2 De G. M. & G. 145, and *Miles* v. *Harford* (1879) 12 Ch. D. 691, followed.

In re Harvey (1888) 39 Ch. D. 289, and *Hancock* v. *Watson* [1902] A. C. 14, considered and distinguished.

ADJOURNED SUMMONS.

By his will, dated April 5, 1898, Thomas Curryer (hereinafter called "the testator"), who died on September 12, 1903, provided (inter alia) " . . . . on the decease of my surviving child or on the death of the last surviving widow or "widower of my children as the case may be whichever shall "last happen I direct my trustees to stand possessed of the "trust fund including therein the accumulated sum at the "end of the said term of twenty-one years" (that being a reference to his residuary estate, including certain accumulations directed by the will) "in trust for my grandchild or "grandchildren living at the period of distribution and the "issue then living of my grandchild or grandchildren dying "before that period such grandchild or grandchildren taking "their parents' share as tenants in common the shares of "grandchildren and other issue being males to be paid at the "age of twenty-one years or being females at that age or "marriage."

This summons was taken out on May 5, 1938, by one of the three trustees of the will (and of three codicils thereto immaterial to this question) to determine (inter alia) whether the bequest of the trust fund and accumulations " on the decease "of my last surviving child or on the death of the last surviving "widow or widower of my children as the case may be "whichever shall last happen " was void as infringing the rule against perpetuities.

R. W. Goff for the plaintiff.

George Strickland for five defendants beneficially interested under the will and codicils, two of them in this gift, referred to *Monypenny* v. *Dering* (1) and *Miles* v. *Harford.* (2) The testator has given the capital on two events. The words "whichever shall last happen " mean quite clearly that there is more than one event.

G. M. Parbury for another of the three trustees, representing the grandchildren, also interested in this gift, adopted the last argument.

W. E. Vernon for the third of the three trustees, representing the widowers and widows of children, who were annuitants.

Henry Johnston for a defendant representing the heir-at-law and next of kin. There are two cases against the contention made on behalf of the first five defendants—namely, *In re Harvey* (3) and *Hancock* v. *Watson.* (4) On the words of the will in the present case the testator has fixed the event, making it the death of the last survivor of a number of persons. The language which he has used is not severable.

MORTON J. [after stating the facts:] It is plain that a gift to a class to be ascertained on the death of the testator's last surviving child would not infringe the rule against perpetuities. It is equally plain that a gift to a class to be ascertained on the death of the last surviving widow or

(1) 2 De G. M. & G. 145.
(2) 12 Ch. D. 691.
(3) 39 Ch. D. 289.
(4) [1902] A. C. 14.

widower of the testator's children would infringe the rule against perpetuities, since one or more of the testator's children might marry a person who was born after the testator's death.

Mr. Strickland, for defendants interested in the gift, who contends that the gift is valid, has referred me to *Monypenny* v. *Dering* (1), and in particular to the judgment of Lord St. Leonards L.C., who says: " . . . . the Courts have gone "at least to this extent, that they will not hold a gift over "made in words comprising only one event as made on two "events, although in point of fact it may consist very "reasonably of two branches, unless the testator has himself "so expressed it." I may add that in the present case there would be no question of carrying the estate over—to quote Lord St. Leonards' words—" under the limitation at the "expense of any person whom the testator intended to take." If it should so happen that the last survivor of the testator's children outlives the last surviving widow or widower of a child of the testator, and the class of grandchildren and remoter issue is ascertained on the death of such last survivor, no one will be displaced whom the testator intended to take.

The next case to which Mr. Strickland referred is *Miles* v. *Harford.* (2) Sir George Jessel M.R. says: " As I understand "the rule of law it is a question of expression. If you have "an expression giving over an estate on one event, and that "event will include another event which itself would be "within the limit of perpetuities, or, as I say, the rule against "perpetuities, you cannot split the expression so as to say "if the event occurs which is within the limit the estate shall "go over, although, if that event does not occur, the gift "over is void for remoteness. In other words, you are bound "to take the expression as you find it, and if, giving the "proper interpretation to that expression, the event may "transgress the limit, then the gift over is void. What I "have said is hardly intelligible without an illustration: "On a gift to A. for life with a gift over in case he shall have "no son who shall attain the age of twenty-five years, the

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(1) 2 De G. M. & G. 145, 183.

(2) 12 Ch. D. 691, 702.

"gift over is void for remoteness. On a gift to A. for life, "with a gift over if he shall have no son who shall take priest's "orders in the Church of England, the gift over is void for "remoteness; but a gift superadded, 'or if he shall have "'no son,' is valid, and takes effect if he has no son; yet "both these events are included in the other event, because "a man who has no son certainly never has a son who attains "twenty-five or takes priest's orders in the Church of England, "still the alternative event will take effect because that is "the expression. The testator, in addition to his expression "of a gift over, has also expressed another gift over on another "event although included in the first event, but the same "Judges who have held that the second gift over will take "effect where it is expressed have held that it will not take "effect if it is not expressed, that is, if it is really a gift over "on the death before attaining twenty-five or taking priest's "orders, although, of course, it must include the case of "there being no son. That is what they mean by splitting, "they will not split the expression by dividing the two events, "but when they find two expressions they give effect to both "of them as if you had struck the other out of the will. That "shews it is really a question of words and not an ascertainment of a general intent, because there is no doubt that "the man who says that the estate is to go over if A. has no "son who attains twenty-five, means it to go over if he has "no son at all, it is, as I said before, because he has not "expressed the events separately, and for no other reason. "That is my view of the authorities. This is a question of "authorities."

I have arrived at the conclusion in the present case that the testator has "expressed the events separately." It is quite true that he used the words "whichever shall last "happen"; but he has expressed two quite separate events: ". . . . on the decease of my last surviving child or on the "death of the last surviving widow or widower of my "children . . . ." In my judgment there is a sufficient expression of the two alternatives. In *In re Harvey* (1)

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(1) 39 Ch. D. 289, 299.

(which was referred to by Mr. Henry Johnston) Frv L.J. says: "The true inquiry is whether the testatrix refers to "one event or to two distinct events." In my opinion in the present case, which differs in that respect from *In re Harvey* (1) to which I have just referred, and from *Hancock* v. *Watson* (2), the testator has referred to two distinct events. The fact that he goes on to add "as the case may be whichever shall "last happen" is not sufficient, in my judgment, to make this gift infringe the rule against perpetuities. The result is that the ultimate gift of capital will be valid if the death of the testator's last surviving child happens after the death of the last surviving widow or widower of a child of the testator.

Solicitor: *E. F. Hunt.*

(1) 39 Ch. D. 289, 299. (2) [1902] A. C. 14.

K. R. A. H.

END OF VOL. AND OF CHANCERY SERIES FOR 1938.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1938, will be as follows :—

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Morgan v. *Larivière* (1875) L. R. 7 H. L. 423, 430, and *Compania Naviera Vascongado* v. *S.S. Cristina* [1938] A. C. 485, 506, 516, considered.

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Anchor Trust Co., Ld. v. *Bell* [1926] Ch. 815 followed.

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Morgan v. *Jeffreys* [1910] 1 Ch. 620 and *Davis* v. *Symons* [1934] Ch. 442 considered and followed.

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Ascherson v. *Tredegar Dry Dock and Wharf Co.* [1909] 2 Ch. 401, followed, and observations thereon of Sargant L.J. in *In re Anderson-Berry* [1928] 1 Ch. 290, 307, 308, considered. TATE *v.* CREWDSON **Morton J. 869**

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7 Edw. 7, c. 29 (Patents and Designs) ss. 11, 21, 25, 26: *In re* JOHNSON & JOHNSON (GREAT BRITAIN), LD'.S LETTERS PATENT No. 387,125
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1 & 2 Geo. 5, c. 46 (Copyright), s. 5, sub-s. 2; s. 24, sub-s. 1 (*a*): Coleridge-Taylor *v.* Novello & Co. **Morton J. & C. A. 608, 850**

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4 & 5 Geo. 5, c. 10 (Finance), s. 14: *In re* White - - **Clauson J. 366**

4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 45: *In re* Warren - **Div. Ct. 725**

4 & 5 Geo. 5, c. 91 (Welsh Church), s. 8, sub-s. 2; ss. 14, 15, 18: Price *v.* Representative Body of the Church in Wales - **C. A. 434**

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9 & 10 Geo. 5, c. 79 (Trade Marks), s. 7: *In re* Registered Trade Mark No. 530,535 of Boots Pure Drug Co. **C. A. 54**

9 & 10 Geo. 5, c. 80 (Patents and Designs), s. 4: *In re* Johnson & Johnson (Great Britain), Ld.'s Letters Patent No. 387,125 - **C. A. 283**

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10 & 11 Geo. 5, c. 67 (Government of Ireland), ss. 8, 20, 28, 61, 69: *In re* White - - **Clauson J. 366**

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11 & 12 Geo. 5, c. 21 (Dentists), s. 1: Bynoe *v.* General Federation of Trade Unions Approved Society - - - **C. A. 164**

11 & 12 Geo. 5, c. 55 (Railways): Att.-Gen. *v.* Liverpool Corporation **C. A. 76**

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14 & 15 Geo. 5, c. 38 (National Health), ss. 22, 75, 93: Bynoe *v.* General Federation of Trade Unions Approved Society - **C. A. 164**

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15 Geo. 5, c. 18 (Settled Land), s. 93, Sch. III., Part. II., para. (v.): *In re* Insole's Settled Estate **Simonds J. & C. A. 408, 812**

15 Geo. 5, c. 19 (Trustee), s. 31: *In re* Leng - - - **Simonds J. 821**

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15 Geo. 5, c. 23 (Administration of Estates), s. 35: *In re* Turner **Simonds J. 593**

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16 & 17 Geo. 5, c. 51 (Electricity), s. 47: Att.-Gen. *v.* Liverpool Corporation - - - **C. A. 76**

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17 & 18 Geo. 5, c. 21 (Moneylenders), s. 6,. *In re* Chetwynd's Estate **C. A. 13**

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17 & 18 Geo. 5, c. 36 (Landlord and Tenant), s. 19, sub-s. 2: Lambert *v.* F. W. Woolworth & Co. - **C. A. 883**

1928.

18 & 19 Geo. 5, c. 14 (National Health), s. 16, sub-s. 3: Bynoe *v.* General Federation of Trade Unions Approved Society - **C. A. 164**

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19 & 20 Geo. 5, c. 23 (Companies), ss. 74, 380: KNIGHTSBRIDGE ESTATES TRUST, LD. *v.* BYRNE **Luxmoore J. 741**

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23 & 24 Geo. 5, c. 53 (Road and Rail Traffic), s. 1, sub-ss. 1, 2, 3; s. 2, sub-ss. 1, 2, 3, 4; s. 4, sub-s. 1; s. 5; s. 6, sub-ss. 1 (*a*), 2 (*a*), (*b*), (*c*), (*d*); s. 7; s. 11, sub-ss. 1, 2, 3, 4, 5; s. 13: WOODWARD *v.* LICENSING AUTHORITY FOR THE NORTH-WESTERN TRAFFIC AREA **Farwell J. 331**

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26 Geo. 5 & 1 Edw. 8, c. 34 (Finance), ss. 24, 25: *In re* WHITE **Clauson J. 366**

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